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CASE AND COMMENT

HABEAS CORPUS—IS A PROTECTORATE FOREIGN TERRITORY?

Ex p. Mwenya [1959] 3 W.L.R. 767 decided that the issue of the writ of habeas corpus by the Queen's Bench Division of the High Court in England is not limited to colonies but extends to territories which are "under the subjection of the Crown" in the sense that their government is in legal effect indistinguishable from that of a colony. The facts of the case were that Mwenya, a native of Northern Rhodesia, which at all material times was a protectorate, was required under an emergency regulation duly made by the Governor of Northern Rhodesia to remain in a certain district of the territory. The order was made under the powers contained in the Foreign Jurisdiction Act, 1890.

In an affidavit by the Secretary of State for the Colonies the protectorate was stated to be a foreign country within the meaning of the Act of 1890 and that it had never been acquired as part of the dominions of the Crown. Hitherto a matter such as the detention of a native resident in a protectorate has been treated as an act of state: *The King* v. *Crewe, ex p. Sekgome* [1910] 2 K.B. 576, where a protectorate was regarded as "a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous." The present case was decided on the assumptions that (1) Mwenya was a British subject and not, as might have been expected, a British protected person, that (2) the Order in Council under which the emergency regulations were made was invalid and that (3) the restriction on residence was of such a nature as to enable him, had he been resident in England, to apply for the writ.

The Divisional Court had held that it had no jurisdiction to issue a writ of habeas corpus to custodians in a protectorate in

respect of detention there; [1959] 3 W.L.R. 509. The appeal was argued solely on the ground that there was jurisdiction to give leave to issue the writ against the Governor of Northern Rhodesia and the District Commissioner. The Colonial Secretary's control over the appellant was not the subject of argument in the Court of Appeal.

The assumptions referred to above deprive the case of much of its interest. It was assumed that Mwenya was a British subject; his status, however, would seem to have been that of a British protected person. The Order in Council from which his restricted residence flowed was assumed to be invalid through failure to publish in the *London Gazette* notice of intention to make the Order back in 1939, when the Rules Publication Act, 1893, was still unrepealed. The third assumption—that the restriction on residence was of such a nature as to enable application for the writ—was clearly questionable, because Mwenya was allowed unrestricted movement over an area at least 1,500 square miles in extent and within that area he was not subject to anything in the nature of detention or limitation of his movements.

There was thus left for the Court of Appeal the single preliminary point—was the court debarred from ordering the writ to issue in favour of a British subject simply because the detention complained of was in an area labelled " protectorate," though there was no hint of any power or jurisdiction being vested elsewhere than in the Crown or in Parliament? Neither in the Divisional Court nor in the Court of Appeal was there any evidence or finding on the nature and extent of the power, jurisdiction or sovereignty exercised by the Crown in regard to Northern Rhodesia as a so-called protectorate. Jurisdiction of the Crown in a protectorate is exercised by virtue of the Foreign Jurisdiction Act, 1890, which enables the Crown to exercise jurisdiction in a foreign country in the same and as ample a manner as if that jurisdiction had been acquired by the cession or conquest of the territory. In the case of Northern Rhodesia there was no detailed evidence before the courts as to what were the treaties or other arrangements from which the jurisdiction was derived. Nor indeed does the word " protectorate " lend itself to a recognised or precise meaning. The Court of Appeal accordingly contented itself with a brief examination of the history of the prerogative writ of habeas corpus. It examined the important judgment in *Ex p. Anderson* (1861) 3 E. & E. 487, from which derives the proposition that the establishment of a local court in Canada did not of itself take away the right of the Queen's courts in London to issue the writ in the colony. The terms of the Habeas Corpus Act, 1862, which in the following year took away the

jurisdiction of the courts in London if the colonial court was competent to issue the writ, were an acknowledgment of the principle laid down in *Anderson's* case that the writ could issue into any part of the Queen's dominions. But must issue be limited to any part of the Queen's dominions properly so called? The Divisional Court thought that this was implicit in the terms of the Act of 1862, but the Court of Appeal thought that the answer depended on the extent to which the Crown or Parliament has in fact assumed and exercised jurisdiction, particularly over the internal affairs of a country to the exclusion of any other, or other effective, jurisdiction. The conclusion was that the nature and extent of the powers exercised by the Crown *vis-à-vis* Northern Rhodesia were indistinguishable from those exercised in colonial territory properly so called. Accordingly the principle in *Anderson's* case was held to apply and, given the three initial assumptions, Mwenya was entitled to the writ.

This case would undoubtedly have gone to the House of Lords but for the fact that within a week of the judgment of the Court of Appeal being delivered the Governor of Northern Rhodesia revoked the order restricting Mwenya's area of residence. Accordingly there was no ground for continuing the proceedings. The decision is limited to Northern Rhodesia and therefore would not run in any protectorate, if such survive, where the foreign ruler retains any part of his personal jurisdiction.

But even if protectorates of the older sort are no more, the issue of liberty of the subject is of increasing importance in the several remaining African protectorates, including trust territories. The Administration of Justice Bill, 1960, dealing (*inter alia*) with appeals in habeas corpus cases might well be extended to clarify the jurisdiction of the High Court in overseas territories which are not covered by the Habeas Corpus Act, 1862.

E. C. S. Wade.

DEFAMATION—JUDICIAL PRIVILEGE—DISCIPLINARY TRIBUNAL

The plaintiff in *Addis* v. *Crocker* [1959] 3 W.L.R. 527 had previously proved himself a benefactor to the law of defamation and privileged statements: see *Addis* v. *Odhams Press Ltd.* [1958] 2 Q.B. 275, noted in [1958] C.L.J. 28, 157. He now appeared in person to argue a preliminary point of law in his action for libel against members of the disciplinary committee constituted under section 46 of the Solicitors Act, 1957. These gentlemen had published certain findings and orders (as they were bound to do, though

their sittings were required to be in private) in respect of proceedings against a certain solicitor, and these contained, so Addis alleged, statements defamatory of himself.

The defendants claimed absolute privilege as members of a statutory tribunal. The plaintiff denied that they were so entitled and argued too that the publication was not in accordance with the statutory procedure laid down by the Act and the rules made under it.

It was clear that the onus of proof lay on the defendants, and Gorman J. addressed himself first to the question of privilege. Having reviewed the cases, he found that the basic principle of immunity in respect of judicial proceedings was, in the language of Lord Esher M.R. in *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* [1892] 1 Q.B. 431 at 442, "applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes." The judge agreed with the defendants that their committee was not merely performing administrative functions, but that on the contrary they were bound to act judicially in exercising a judicial function, and that therefore their findings and orders were absolutely privileged. He also held that the publication was in accordance with the statutory procedure, and so gave judgment for the defendants.

The law therefore draws a line between the exercise of judicial functions and of administrative functions. Some bodies may on different occasions exercise both judicial and administrative functions. Absolute privilege has not been allowed to proceedings of bodies exercising administrative functions, such as the London County Council when granting music and dancing licences, and justices when granting liquor licences, though it has been suggested that evidence on oath by a witness before administrative tribunals should be absolutely protected (Franks Committee, (1957) Cmnd. 218, para. 82). The disciplinary committee in this case was clearly more closely analogous to a court-martial or a military court of inquiry, where proceedings are absolutely privileged: *Dawkins* v. *Lord Rokeby* (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744. An administrator may, of course, act under a judicial procedure without performing a judicial function. He may weigh evidence carefully and use his discretion honestly. But ultimately it is what a man is doing, rather than how he may or must do it, that determines his judicial or administrative status and that of his inquiry.

The principle of immunity is well settled, and the present case only illustrates its application to a new set of facts. The basis of the principle as applied to persons exercising a judicial function is indeed somewhat wider than the defamation cases would suggest. It affords not only the defence of absolute privilege but more generally comprehensive immunity to civil liability where the judge acts, to borrow a phrase, " within the scope of employment." The justification for this immunity is perhaps best expressed in the words of a Chief Justice of the Common Pleas as long ago as 1674 when he said: " They who are entrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage." Nor does the general immunity from civil liability protect judges alone, as witness the recent case of *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45. There Lord Goddard C.J. rejected as unfounded in law the plaintiff's claim that perjured evidence given by the defendants in a trial leading to his conviction entitled him to damages.

D. E. C. Yale.

CRIMINAL LAW—FITNESS TO PLEAD—AMNESIA

In *R.* v. *Podola* [1959] 3 W.L.R. 718; 43 Cr.App.R. 220, the accused was indicted for capital murder. He was alleged to have shot a police officer, who had him under arrest, on July 13, 1959. A preliminary defence was raised that he was unfit to plead to the indictment, and to stand his trial, as he was suffering from hysterical amnesia, whereby he was unable to recollect what had happened to him between July 1 and July 16.

A jury was impanelled to try this preliminary issue whether he was insane within the Criminal Lunatics Act, 1800, s. 2. Edmund Davies J., the trial judge, directed the jury that the burden of proof of insanity lay upon the accused, but that it was a lesser burden than that upon the prosecution, involving merely proof on the balance of probabilities (*Carr-Briant* [1943] K.B. 607) as distinct from proof beyond reasonable doubt. The jury found that the accused was not suffering from loss of memory, and was sane and fit to plead. The accused was then arraigned on the charge of capital murder, and ultimately convicted and sentenced to death.

The accused did not appeal, but the Home Secretary referred the whole case to the Court of Criminal Appeal, under the Criminal Appeal Act, 1907, s. 19 (*a*), as amended in 1948. A full court of five judges first determined whether it had jurisdiction to hear the

reference. The one question referred by the Home Secretary related to the onus of proof on the issue of fitness to plead. It was argued that the court could hear a case referred under section 19 only if the accused himself could have appealed, and that an accused can appeal only against a conviction, and not against a preliminary finding of fitness to plead. The court left open the question whether a reference could be considered even where the accused had no right of appeal, holding that where an accused has been convicted after a preliminary finding of fitness to plead, he may appeal against that preliminary finding. The court overruled the earlier decision of the court in *Jefferson* (1908) 24 T.L.R. 877, as in conflict with the decision of the House of Lords in *Crane* v. *D. P. P.* [1921] 2 A.C. 299, to the effect that where the accused has been convicted on an indictment bad in law, he can appeal against conviction on the ground that he should never have been tried on the substantive charge. This is a welcome ruling. The court is strictly not bound by its previous decisions: *Taylor* [1950] 2 K.B. 368; but normally it treats them with great respect, and shows a natural reluctance to overrule them. There should, however, be no hesitation in rejecting an authority at variance with a decision of the House of Lords. At best, *Jefferson* was a weak authority, as counsel for the accused withdrew his plea *arguendo* the moment he encountered strong opposition from Darling J. It may be mentioned in this context that the House of Lords has held that no appeal lies to the Court of Criminal Appeal against a verdict of guilty but insane: *Felstead* [1914] A.C. 534; and the latter court has held that no appeal lies against a preliminary finding that the accused is *unfit* to plead: *Larkins* (1911) 6 Cr.App.R. 194.

The court then considered whether they had power to go beyond the express terms of the Home Secretary's reference, and to decide whether amnesia could be in law a form of insanity. The court resolved that in the circumstances they had this power, since the matter of onus of proof, the express subject of the reference, would arise only if amnesia could in law negative fitness to plead and to stand trial. They distinguished the case of *Caborn-Waterfield* [1956] 2 Q.B. 379. There the accused wished to reopen questions of alleged misdirection and misreception of evidence, which had nothing to do with the reference, and had already been considered by the Court of Criminal Appeal, on an application by the accused himself for leave to appeal, and rejected. The refusal to entertain such a claim anew was clearly justified, but the remarks of Lord Goddard C.J. that it is quite impossible for the court to go outside the terms of reference seem contrary to the statute itself, which appears to distinguish

between a reference of " the whole case " under section 19 (*a*), and a reference of " any point arising in the case " under section 19 (*b*). Under the former reference the matter appears to be at large, as was argued by the appellant's counsel (p. 382).

On the main question referred to the court in *Podola* regarding the onus of proof upon the issue of fitness to plead, it is held that if the issue is contested, the onus rests on the party that advances the contention, the prosecution or the defence, as the case may be. It is, however, stressed that where the plea is raised by the defence, the onus is the lesser one of proof on the balance of probabilities: *Carr-Briant* (*supra*). Finally, if the point is raised by the prosecution, whether contested or not, or by the court itself, the jury must be " satisfied " that the accused is insane so that he cannot be tried. In using the word " satisfied," the court is presumably harking back to the case of *Summers* (1952) 36 Cr.App.R. 14, where Lord Goddard C.J., delivering the judgment of the Court of Criminal Appeal, suggested that the traditional description of the burden on the prosecution in terms of proof beyond reasonable doubt ought to be replaced by a direction to the jury that they must be " satisfied " or " satisfied so that they can feel sure." Dr. Glanville Williams mounted an attack on this innovation in *The Proof of Guilt*, 134–138, and Lord Goddard himself in *Hepworth & Fearnley* [1955] 2 Q.B. 600 conceded that there were possibilities of error inherent in the new form of words, and that at any rate on a charge of receiving more explanation was called for. Now Lord Goddard's successor has apparently adopted this innovation without discussion or comment, and moreover in the less emphatic of the two forms, regarded by Glanville Williams as especially inadequate: see [1955] Crim.L.R. 464–467. This resuscitation is in an *obiter dictum*, as in this case it was the defence who raised the plea, and it is to be hoped that it will not be regarded as settling a point upon which the author himself seems to have had second thoughts, and not to have been satisfied so as to feel sure!

In deciding that the onus lay on the defence if the plea was raised by them, the court followed Cresswell J. in *Turton* (1854) 6 Cox 385, and a Scottish case in which this very defence of hysterical amnesia had been pleaded: *Russell* v. *H.M. Advocate*, 1946 S.C.(J.) 37. They overruled the most recent authority on the point, a decision of Salmon J. in *Sharp* (1958) 41 Cr.App.R. 197. There is now a fuller report of this case as *Sharpe* in [1959] 3 W.L.R. 735n., and from this it appears that Salmon J. did not place the onus on the prosecution until he had called in vain for authority to the contrary. This request for authority was a strange one, as *Turton*

had already been cited to the court. In the instant case, the court found support for their view in *Rivett* (1950) 34 Cr.App.R. 87, but this, the only report, does not indicate how the trial judge directed the jury. Although the authorities were in a confused state, it is submitted that the court in *Podola* reached the correct conclusion. The onus of proving insanity as a defence to the actual charge, as distinct from a plea in bar of trial, rests upon the accused, unless it is raised by the prosecution in reply to a defence of diminished responsibility in a case of murder: *Bastian* [1958] 1 All E.R. 568. The decision in the latter case accords with the view now expressed in *Podola* that the onus on a question of mental disease lies on him who raises it. The Homicide Act, 1957, moreover, places the onus of diminished responsibility upon the defence: s. 2 (2). The uniform principle now discernible in case and statute is, therefore, that it is for the defence to establish mental illness, unless it is the prosecution that raises the plea, or the court itself considers evidence that comes from some independent quarter.

Finally the court consider whether an accused, who is suffering from hysterical amnesia rendering him incapable of recalling the events during the vital period of the indictment, is to be regarded as unfit to plead. The remarks on this point are *obiter*, in view of the finding of the jury that the accused was under no such disability. Counsel for the accused relied mainly upon a passage from a seventeenth-century work, Hale's *Pleas of the Crown*, where it is said that a man ought not to be arraigned unless he is of " sound memory." The court hold that the word " memory " refers not to recollection, but to a state of mind. This view might have been confirmed from the *Oxford English Dictionary*, which gives instances of the use of the word in the latter sense ranging from the fifteenth to the nineteenth century. The court observed that for England the plea was unique, but that it had been rejected in Scotland: *Russell* v. *H.M. Advocate* (*supra*). The Scottish Court was considering the defence in relation to a charge of fraud. In the High Court of Justiciary, where it was admitted on all hands that the plea was genuine, and established by the evidence, Lord Sorn rejected the plea as bad in law, on the ground that it was novel, had not been relied on in the case of *Fraser* (1878) 4 Coup. 70, where the defence was that the accused was asleep, and would open the door to an accused who at the time of the alleged offence was drunk, suffering from a head injury causing loss of memory, or was by nature a person of unreliable memory. On appeal, the view of Lord Sorn was approved, though the court held that it had not been established that the accused was suffering from any such loss of memory. In the instant

case, counsel for the accused sought to distinguish the case of a drunken accused, as his condition would not have been caused by the visitation of God, whereupon Hilbery J. asked whether hysterical amnesia as distinct from constitutional amnesia could not be said to be brought about by a man's own act (43 Cr.App.R. at p. 227). Counsel replied that it was a reaction of the mind, of its own motion. Be that as it may, it is submitted that the court was right in holding that a court may proceed to the trial of an accused, even though he is suffering from hysterical amnesia. The problem really resolves itself into two questions, first whether he is fit to plead, and secondly whether he is fit to stand his trial. The matter was considered from these two aspects separately in *Dyson* (1831) 1 Lew. 64, and in *Pritchard* (1836) 7 C. & P. 303. Each of the accused was a deaf mute, and found so to be by the visitation of God by a jury. In *Dyson's* case, a witness testified that she was able to explain to the accused the nature of the charge in sign language, so that she was held capable of pleading to the indictment, but it was not possible to convey to her that she was entitled to challenge the jurors. Therefore the trial could not proceed, and she was ordered to be detained during His Majesty's pleasure. In *Sharp(e)* (*supra*), a case of another deaf mute, Salmon J. rejected the plea of Crown counsel that the two questions should be tried separately. In the instant case the court held that an accused who did not recollect the events upon which the charge was based could stand his trial, as the vital matters (according to *Pritchard*, and in fact also according to *Dyson*, though the clearest report in *Lewin* was not before the court) were ability to understand the right of challenge, and to follow the evidence as it proceeded.

What safeguards are necessary to protect an accused genuinely suffering from hysterical amnesia? The remedy advocated by the defence in *Podola* but refused by the court is to hold him unfit to plead. Such a remedy would not be palatable to the accused, unless charged with capital murder, as it would lead to detention during pleasure. There was no question of injustice in the *Podola* case as the evidence was irrefragable, but the court and jury must bear in mind in such cases that the accused is not in a position to give any explanation. In the Scottish case of *Russell* (*supra*) Lord Sorn observed that the jury could not found a conviction upon the absence of any explanation from the accused (at p. 40). Such a warning would be particularly appropriate on a charge of receiving recently stolen property found in the possession of the accused. It was argued for Russell, who was charged with misappropriating money she had received under a promise to invest it, that she might

have forgotten the name of the stockbroker through whom she had acted (pp. 45–46). The appellate Scottish court remarked that such a defence plays its part in increasing the onus upon the Crown (p. 48). In *Podola* the court do not interpret these words as meaning that the onus is greater, but that the judge must point out to the jury that they must take into consideration carefully that the accused cannot remember the events. It certainly seems preferable to leave the accused to the mercy of a jury armed with such a warning, rather than to regard him as unfit to plead, and liable to be detained indefinitely.

R. N. Gooderson.

CONTRACT—C.I.F.—FRUSTRATION—CLOSURE OF SUEZ CANAL

Albert D. Gaon & Co. v. *Société Interprofessionnelle des Oléagineux Fluides Alimentaires* [1959] 3 W.L.R. 622 is the third of the trinity of very similar cases which have come before the English courts as the result of the closure of the Suez Canal in November 1956. The two previous ones—*Carapanayoti's Case* [1959] 1 Q.B. 131 and *Tsakiroglou's Case* [1959] 2 W.L.R. 179—were noted in [1959] C.L.J. 25.

Gaon's case concerns, as did the two others, the effect of the closure upon a contract of sale of goods (cotton seed cake or groundnuts) to be shipped c.i.f. from the Sudan—to Belfast in the first case, and Hamburg in the second case, and Nice and Marseilles in this third case. The contest is between buyer and seller. No case has come before the English courts concerning the effect of the closure upon the contracts of affreightment doubtless entered into with shipowners by the c.i.f. sellers for the performance of their c.i.f. contracts: all such cases have apparently been settled (see p. 630) —which itself throws an interesting light on the decline of commercial litigation in this country.

Ashworth J. in *Gaon's* case, upholding the award of the Committee of Appeal of the Incorporated Oil Seed Association in London, held that the c.i.f. contract was not frustrated; and in so doing most directly departed from the view expressed by McNair J. in *Carapanayoti's* case. Diplock J., who in *Tsakiroglou's* case also held that the contract was not frustrated, was able to find a somewhat perilous distinction in the findings of fact between his case and McNair J.'s.

The three cases taken together provide a most interesting illustration of the doctrine of frustration. A view acceptable to a judge of McNair J.'s experience in commercial matters has evidently much to commend it. The shipping dislocation produced by the

canal's closure was extreme. Moreover, as expressly found in *Gaon's* case, *both parties* if they had given their minds to the question would, at the date of the contract, have contemplated that the shipment would be made via Suez: indeed it seems clear that, while Suez remained open, a shipment round the Cape could have been rejected by the buyer. The shipment via the Cape involves a sea transit of 10,500 miles; via Suez it is approximately 2,300: it does prima facie seem to be a radically different performance.

Yet the view of Diplock and Ashworth JJ. may nevertheless be preferred. Perhaps the most immediate argument in favour of that view is that the shipment *contractually* provided for was " shipment from a Sudanese port . . . by steamer or steamers (tankers excluded) direct or indirect with or without trans-shipment " and such a provision does not amount to a *contractual* provision for shipment " via Suez." Clearly what *one* party expects the other party to do, even if the expectation is reasonable, does not put contractual obligation upon the other to fulfil that expectation. What these cases indicate is that even when *both* parties concur at the moment of contract in expecting a particular mode of performance, even this concurrence of expectation does not of itself and necessarily make that mode of performance a term or condition of the contract. There is a distinction, though no doubt it may become a fine one, between what the parties even jointly and reasonably may expect to happen and what each is contractually justified in requiring of the other. And it may also be suggested that with the extreme and increasing elaboration of commercial contracts it is and should increasingly become more difficult to convert an unexpressed understanding (even if prima facie reasonable enough) into a *contractual* term or pre-condition.

However, even if what may be termed the majority view is preferable, the student must appreciate the limits to be placed upon it. He should bear it in mind that in all three cases the professional commercial view was that the groundnuts or cotton seed cake delivered via the Cape would be commercially a good performance of his obligations by the seller.

C. J. Hamson.

CONTRACT—EXCEPTIONS CLAUSE—FUNDAMENTAL BREACH—AGENTS

Sze Hai Tong Bank Ltd. v. *Rambler Cycle Co., Ltd.* [1959] A.C. 576 (J.C.) is a case concerned with the construction of an exceptions clause and with the problem of fundamental breach. The judgment of their Lordships, however, delivered by Lord

Denning, is of more general interest, since it also raises questions which touch upon vicarious liability, and the liability of corporations, and other principals, for breach of contract committed by their agents. Before his lordship's speech these formidable legal tangles fall away like creepers struck down by the explorer's axe; but it may be that they have fallen in a pattern so complex that the student must pick his way with care.

The respondent manufacturer had shipped bicycle parts to Singapore under a bill of lading which stated that they were to be delivered "unto order or his or their assigns." After the discharge of the goods from the ship at Singapore the carrier's agents released them to the consignees, without requiring the latter to produce the bill of lading. Instead they accepted a written indemnity from the consignees' bank. The consignees never paid for the goods, and the respondent now claimed damages for breach of contract against the carrier, who in turn claimed indemnity against the consignees and the appellant bank. In reply to the allegation that release of the goods by the carrier's agents without requiring production of the bill of lading was a breach of contract, the appellants pointed to Clause 2 (c) of the bill. This provided that "the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods shall be deemed . . . to cease absolutely after they are discharged" from the ship. Clause 2 (c) protected them, they argued, because these goods had been discharged from the ship, and after discharge their duty was at an end.

The doctrine of "fundamental breach" is now sufficiently familiar to students of the law of contract for its appearance in this context to cause them no surprise. It was the principal weapon with which to strike down the shield of Clause 2 (c) and make the carriers liable. So indeed it happened. Although the exception "on the face of it could hardly be more comprehensive," the Judicial Committee felt that its scope could not be extended so as to cover what occurred. "If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract as it seems to their Lordships has, as one of its main objects, the proper delivery of the goods by the shipping company 'unto order or his or their assigns' against production of the bill of lading" (p. 587). Indeed, their Lordships at an early stage of the judgment come close to deciding the whole issue by stating: "it is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril" (p. 586). Obviously if that is one of the primary objects of the contract, the exceptions clause has to receive a

restricted interpretation. The carriers could not be permitted to give away the goods at their whim and pleasure.

In previous notes in [1957] C.L.J. 12 and 16 a number of similar cases were discussed. It was then (at p. 20) pointed out that there can be no question of inconsistency between exceptions clauses and main objects until the latter are established; and that a party who wished to limit his liabilities might now more profitably turn to "shrinking the core" of his contract than to the insertion of bigger and better exceptions clauses. This train of thought is suggested by the argument of counsel in the present case. "Clause 2," he argued "is not an exceptions clause at all," but a definition of the primary obligations (p. 579 *et seq.*). After discharge there is no longer any duty; and there can be no breach (fundamental or otherwise) without a duty (p. 585). This argument is especially attractive to those who regret Lord Denning's approach in the earlier cases, where he said that the court must "look at the contract apart from the exempting clauses" to find the primary obligations (*e.g.*, in *Karsales* (*Harrow*), *Ltd.* v. *Wallis* [1956] 1 W.L.R. 936). The contract, they would argue, must be construed *as a whole*. "You do not take part of the document and consider it by itself; you are to construe the whole document": *per* Scrutton L.J., *Calico Printers' Association* v. *Barclays Bank* (1931) 36 Com.Cas. 197, 203. But the present case, it is suggested, shows that such construction "as a whole" allows the court to construe certain clauses restrictively. Indeed, if that is not so, what is left of the principle that exceptions clauses must be construed *contra proferentem*? The main objects, or primary obligations, can be discovered on a reading of the contract "as a whole"; and that process leads the court to restrict the operation of certain other clauses. The principles of Lord Denning and of Scrutton L.J. do not conflict; they are complementary parts of one process. What must be admitted, however, is the tendency exhibited by the courts to retain as far as possible the obligations usual in the "type" of contract in issue. This classification of contracts into types—almost into types of status—made its appearance also in some of the speeches in *Lister* v. *Romford Ice Co., Ltd.* [1957] A.C. 555, noted in [1957] C.L.J. 21. Their lordships' insistence here on the "perfectly clear law" about a shipowner's liability is another illustration of this tendency to retain the primary obligations usual to the type of contract, unless they are clearly not within the scope of the particular main objects clause.

The extent to which an exceptions clause must be limited in the light of the main objects will vary from case to case. Lord Denning suggests in this judgment that the common thread running through

recent cases is the fact that in each the defendant has been guilty of a " fundamental breach . . . which evinces a deliberate disregard of his bounden obligations " (p. 588). Such a class of case does indeed exist. Lord Denning cites, for example, *Alexander* v. *Railway Executive* [1951] 2 K.B. 582, and *Karsales (Harrow), Ltd.* v. *Wallis* [1956] 1 W.L.R. 936. But the general doctrine of fundamental breach is not restricted to wilful wrongdoing. If there is a contract for the sale of goods, an inadvertent delivery of peas instead of beans, or of beans in which the innocent seller had no title, may cause such a breach; and a breach of a charterparty by deviation, or of a bailment by carelessly storing the goods in the wrong place, can bring the doctrine into play. A formula which places emphasis upon " *deliberate* disregard of obligations " is not wide enough to comprehend the whole doctrine. After all, Lord Denning himself in *Spurling* v. *Bradshaw* [1956] 1 W.L.R. 461 refused to say that " negligence could never go to the root of the contract."

The reason why this element of wilful wrongdoing assumed such a prominent position in the case was the injection into the argument of the case of *Chartered Bank of India* v. *British India Steam Navigation Co., Ltd.* [1909] A.C. 369. There goods had been fraudulently misappropriated by the servants of landing agents in collusion with the consignees; and the Privy Council had held that the carriers were protected by a clause in the bill of lading which said " liability . . . shall absolutely cease when the goods are free of the ship's tackle." Clearly " free of ship's tackle " was not significantly different from " discharge." How could that case be distinguished?

First, it might have been argued that in 1909 the doctrine of " fundamental breach " was undeveloped. The point was certainly not argued in the modern way in the *Chartered Bank* case; and their lordships were allowed to treat the liability clause as definitive of primary obligations. Counsel did not, however, mount this frontal attack on the case. Instead, another point was put to the court which Lord Denning accepted as providing a " simple ground " of distinction. The company might, he thought, have been liable for the servant's fraud in the *Chartered Bank* case, in the absence of an exemption clause (citing *United Africa Co., Ltd.* v. *Saka Owoade* [1955] A.C. 130). But such a liability would have been " solely a vicarious liability " on the part of the company. The servant's " act was not its act. His state of mind was not its state of mind." (In passing, it may be remarked how clearly these remarks adopt as the basis of vicarious liability what has come to be called the " servant's tort theory.") But in the present case the

acts of the agents " were the acts of the shipping company itself "; and they " were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself." The metaphysical language of the *alter ego* doctrine is thus introduced into the law relating to breach of contract.

Objection may be taken to this introduction on two grounds. First, the argument does not follow the usual contours of the *alter ego* doctrine itself. The distinction between (i) vicarious liability for servants or agents and (ii) personal liability for the default of one who can be described as the *alter ego* of the corporation (governing body, director and the like) has been clearly drawn in the law of tort since the latter doctrine was established in *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* [1915] A.C. 705. It has been of great value in other areas of law—*e.g.*, in crime (see *R.* v. *I.C.R. Haulage, Ltd.* [1944] 1 All E.R. 691; contrast *James & Son, Ltd.* v. *Smee* [1955] 1 Q.B. 78); and in regard to the intention of companies generally (see *Bolton (Engineering) Co., Ltd.* v. *Graham & Sons, Ltd.* [1957] 1 Q.B. 159). Attempts to use the language of *alter ego* in contract have been less successful. (In regard to formation of contract, one example is *Newborne* v. *Sensolid (G.B.), Ltd.* [1954] 1 Q.B. 45, where the Court of Appeal treated a director as the personification of a non-existent company !) But in the present case Lord Denning actually crosses the wires. He treats an *ordinary* agent as the *alter ego*. In no other case has an ordinary agent been treated in this way, and it is not easy to see why he should be so treated. Indeed, the judgment leaves us without any clear test as to when the act of the agent will be, and when it will not be, the " act of the company." On this ground alone some reservations must be expressed about the reasoning.

More important, however, the reasoning adopted in *Sze Hai Tong* would introduce an entirely new criterion into the law of contract. It may be that the fraudulent servant had the status or authority necessary to make the company vicariously liable in the *Chartered Bank* case—although in this connection attention should be directed to the remarks of Devlin J. in *Kwei Tek Chao* v. *British Traders & Shippers, Ltd.* [1954] 2 Q.B. 459 at 471. But it is surely not the case that " in the absence of an exemption clause " the liability of the shipping company would have been " solely a vicarious liability." It would have been a liability for breach of contract. The Privy Council, at p. 373 of the *Chartered Bank* case, expressly refused to consider the exact position and status of the landing agents in relation to the shipping company. The reason for that, it is suggested, is that the point was not relevant. In contract the question at issue is not primarily whether the act is the " act of the

company," but whether or not the duty undertaken by the contracting company has been fulfilled. If a party entrusts performance of his contract to an agent he cannot excuse himself for that agent's failure only by pointing to the delegation. He may find a suitable exceptions clause in the contract. But short of that or some other defence, he is liable; and he is liable not vicariously, or on any *alter ego* theory, or even as a principal at all (as Lord Denning again suggests at p. 589), but for breach of contract.

So to argue is not to suggest that there may be no cases in which the problem of agency and authority rears its tired head in relation to breach. If, for example, the agent of one party has done acts or made statements on which the other contracting party wishes to rely as evidence of an intention no longer to be bound, it may well be the case, as Singleton L.J. remarks in *Dumenil, Ltd.* v. *James Ruddin, Ltd.* [1953] 2 All E.R. 294, 298, that " whether an agent can evince an intention of this kind on behalf of the principal must depend on the agent's authority." Similarly, it is possible to think of exception clauses which themselves might raise just such a problem in their construction and interpretation. It is submitted that this was not the case in *Sze Hai Tong*. One other situation may be mentioned. Where the servant charged with the task of fulfilling the contract himself causes the master to be in breach, the injured promisee will not, it appears, be allowed to multiply his causes of action by adding to his action for breach an action against the servant for the *tort* of inducing that breach. To the extent that he is thus protected, the servant may be said to be equated with his master. But no line divides servants here into two categories. The doctrine applies to any " servant acting bona fide within the scope of his authority ": *per* McCardie J., *Said* v. *Butt* [1920] 3 K.B. 497, 506. Curiously enough, when a third party induces a breach, the traditional *alter ego* theory does make an appearance in the context of the same tort. To induce the managing director is to induce the company; but an approach to an ordinary servant is quite a different matter, *per* Evershed M.R. *Thomson (D. C.), Ltd.* v. *Deakin* [1952] Ch. 646, 681. None of these situations, it must be noted carefully, provides authority for the approach adopted in *Sze Hai Tong*.

In the usual case, the language of tort is not really appropriate to the problems of breach of contract; and vicarious liability and the *alter ego* theory are surely irrelevant. It is unfortunate that a decision as important to commercial practice as this one (for, as counsel pointed out (at p. 585), the *Chartered Bank* case of 1909 has been the basis of hundreds of thousands of bills of lading for over half a century) should introduce these novel arguments and

base upon them a distinction between agent's acts which are, and agent's acts which are not, the " acts of the company " which is not easy to follow and will be less easy to apply. It is to be hoped that the decision will be treated rather as another example of the great and growing stream of authority supporting the use of the weapons of " fundamental breach " which can, as Lord Denning has so frequently shown, promote the cause of justice in the law of contract.

K. W. Wedderburn.

INDEPENDENT CONTRACTOR—SHIP REPAIRER—LIABILITY

In *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.* [1960] 2 W.L.R. 86, cargo belonging to the plaintiffs was damaged during a voyage from Sydney to London in the defendants' ship, the cause of the damage being the unseaworthiness of the ship. The plaintiffs sued for the damage and the defendants denied liability on the ground that they had fulfilled their duty under the Hague Rules (which were incorporated in the bill of lading) to " exercise due diligence " to make the ship seaworthy. They proved that the ship had been entrusted to an independent firm of ship repairers of the highest repute, and that the unseaworthiness was the result of negligence on the part of a fitter in the service of that firm. Neither the defendants personally nor any servant of theirs had been negligent. The plaintiffs' claim failed.

In these circumstances the case was primarily concerned with that branch of the law commonly described as " liability for independent contractors," a branch of the law to which much attention has been devoted both in the cases and in the books, but one for which, it seems, no satisfactory principle has yet been discovered. A not wholly dissimilar problem was discussed in the House of Lords in *Davie* v. *New Merton Board Mills* [1959] A.C. 604 ([1957] C.L.J. 134; [1958] C.L.J. 27; [1959] C.L.J. 157)—a case turning upon the nature of the duty owed by a master to his servant—and both in that case and in the *Riverstone* case it was accepted that an analogy existed between the duty of a master to his servant and that of a shipowner to a cargo-owner under the Hague Rules. It is necessary, therefore, to consider the *Riverstone* case in its relation to *Davie's* case, and not merely as being concerned only with a specialised commercial situation. In fact it is suggested that the *Riverstone* case contains implications of great importance to the whole subject of " liability for independent contractors."

This subject is more bedevilled than most by problems of formulation, and confusion is made worse confounded by the use

of apparently descriptive but in fact misleading expressions. We speak of "non-delegable duties," "delegation," "personal negligence" and "vicarious liability" as if these expressions referred to matters themselves clearly defined, but in truth there is nothing solid behind them. It is necessary to get back, so far as possible, to first principles, and the main purpose of this note is to do little more than attempt an elucidation of the reasoning inherent in the present and connected cases. It is not concerned with the social desirability or convenience of the result.

In general two types of liability for damage may be recognised. A man may be held liable vicariously—*i.e.*, for the wrongful act of another—or he may be liable for the breach of some duty which he himself owes to the plaintiff. For vicarious liability to exist there must be a particular relationship between the defendant and the actual wrongdoer, and, for practical purposes today, the only relationship which creates vicarious liability is that of master and servant. A master is liable for the wrongful acts of his servant done in the course of the servant's employment. If, then, my duty in a given situation is personally to exercise reasonable care, I can only be liable if I have personally failed to exercise the requisite care, or if my servant has wrongfully caused the damage in the course of his employment.

Various situations may, however, involve the conclusion that the defendant is liable for damage which is in fact negligently caused by someone other than his servant. It is obvious, for example, that if I am under an absolute statutory duty to achieve a certain result and am prevented from doing so by another's negligence, my own duty has not been fulfilled and so I am liable. It is not necessary, however, to postulate an absolute duty in order to reach this conclusion. It is enough if the duty is to provide, or see, that care is taken. If care is not taken, then the duty is not fulfilled and the defendant, whose duty it is, is liable.

It is this duty which is commonly but inaccurately described as "non-delegable." Strictly speaking no duty is delegable. The point is that a duty personally to exercise reasonable care is performed by entrusting the operation which gives rise to the duty to another person, provided that that person is reputable and is subjected to such supervision as the circumstances may require. A duty to see that care is taken, on the other hand, is only performed if care is in fact taken. If any person involved fails to take care, then the duty is not fulfilled. The precise relationship between the defendant and the actual wrongdoer is immaterial, and it is for this reason, it is suggested, that there is nowhere to be

found a proper definition of an "independent contractor." The only meaning clearly conveyed by that expression is that the person to whom it is applied is not a servant, and so is not someone for whom vicarious liability may exist.

It is in the light of these principles that the *Riverstone* case must be considered, but in view of the analogy held to exist between the shipowner's duty under the Hague Rules and the duty of a master to his servant, it is necessary to consider also both *Davie's* case and the well-known decision of the House of Lords in *Wilson's & Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57. In fact these three decisions form a trilogy of general importance in the law.

In *Wilson's* case a servant of the appellants negligently instituted an unsafe system of working in the appellants' mine, as a result of which the respondent, another servant of the appellants, was injured. The respondent's action could not succeed on the basis of vicarious liability since, at that date, the doctrine of common employment was still part of the law. It was for this reason that the House of Lords based the appellants' liability upon a breach of their personal duty. There had, however, been no personal failure to take care on the part of the appellants and they were, in fact, forbidden by statute from taking any part in the technical management of the mine. The decision involves, therefore, that their duty was stricter than a duty personally to exercise reasonable care. They were, in the result, liable for the negligence of another, but in the then prevailing law their liability could not be vicarious.

The duty established by *Wilson's* case as that owed by a master to his servant was for long regarded as being equivalent to a duty to see that care is taken, and this view found favour with Ashworth J. and Jenkins L.J. in *Davie's* case. The decision of the majority of the Court of Appeal and of a unanimous House of Lords in that case, however, establishes that the duty cannot, after all, be so stated. In *Davie's* case, it will be remembered, a master was held not liable to his servant for damage resulting from negligence in the manufacture of a standard tool. Care had not in fact been taken, yet the master was not liable, and so the duty cannot be to see that care is taken. But *Davie's* case cannot overrule *Wilson's* case and reduce the duty to one personally to take care. How then are the two cases to be reconciled?

It is suggested that the answer is to be found in the *Riverstone* case and, indeed, in its early and long-neglected predecessor, *Angliss (W.) & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* [1927] 2 K.B. 456. In *Angliss's* case shipowners were held not to have been in breach of their duty to exercise

" due diligence " to make a ship seaworthy where negligence on the part of a servant of the shipbuilders led to a latent defect in the ship and made it unseaworthy. According to Wright J., however, the defendants would have been liable if the inspector whom they had appointed to supervise the work had himself been guilty of negligence. Similarly in the *Riverstone* case shipowners were held not liable where negligence on the part of a servant of the ship repairers again led to a latent defect, but the Court of Appeal agreed that had Mr. Atkinson, a marine superintendent in the service of the managers of the ship (an independent company) who was engaged in supervising the work of the ship repairers, been negligent, then for his negligence the shipowners would have been liable.

Neither the inspector in *Angliss's* case nor Mr. Atkinson in the *Riverstone* case were servants of the shipowners. The liability which the shipowners would have incurred, had those individuals in fact been negligent, cannot, therefore, be regarded as vicarious. The position is thus that, apart from servants, there are some persons for whose negligence a shipowner will be liable and others for whose negligence he will not.

It has already been shown that the duty owed by masters—and thus, in view of the analogy, by shipowners as well—cannot be a mere duty personally to take care (*Wilson's* case); nor can it be a duty to see that care is taken (*Davie's* case). It must be intermediate between the two. This requirement, it is suggested, is only satisfied if a distinction is taken between the different kinds of person (other than servants) who may be members of the *dramatis personae*. For the negligence of some only of these persons will the shipowner be liable. For others he will not. Just such a distinction was in fact taken both in *Angliss's* case and in the *Riverstone* case.

The problem is, therefore, to extract the principle upon which this distinction rests. If the defendant's duty in a given case is of the intermediate kind, whose negligence is it that will involve the defendant in breach? An alternative way of asking the same question is to seek a formulation of the intermediate duty, and in the light of the cases it is tempting to say that the duty is twofold: personally to exercise reasonable care and also to provide non-negligent supervision. Both the inspector in *Angliss's* case and Mr. Atkinson in the *Riverstone* case were engaged in supervision, and for their negligence the shipowners would have been liable. Moreover this formulation of the intermediate duty enables us to say simply that it carries with it liability for the negligence of " supervisors " but not of other kinds of person.

If this is correct then we can say that a duty to provide non-negligent supervision is imposed by law upon masters and shipowners. If either of these persons fails to provide any supervision at all, and damage results, then he is liable for a personal failure to take the requisite care. If a " supervisor " is appointed and he is negligent, then the duty will again be broken, and this will be so whether the " supervisor " happens to be a servant or not.

It is suggested that there is here a workable principle which may be applied generally in the law. The important decision in each case will be to determine the precise level of the defendant's duty. If it is personally to take care, and no more, then the defendant will be liable only for his own negligence and, of course, vicariously liable for his servant's negligence. If it is a duty also to provide non-negligent supervision, then he will be liable for his own negligence and for that of his servants and " supervisors." If it is a duty to see that care is taken, then he will be liable for the negligence of anyone involved. (But even here he will not be liable unless someone has been negligent.)

On this basis the creative choice, if one is open to the judge at all on the facts of the case and in the light of existing authority, will be made in fixing the level of duty, and this, surely, is where the choice ought to be made. Once the facts have been found and the defendant's duty determined, his liability or non-liability should follow automatically.

It cannot, at this stage, be finally concluded that the intermediate duty is one carrying with it liability for the negligence of " supervisors " and for no other class of person. There may be cases in which liability for the negligence of persons who are neither servants nor " supervisors " is found to exist without its being also held that the duty is to see that care is taken. Nevertheless, it is suggested that the distinction between " supervisors " and others not only explains the existing case law, but also rationalises the confusing distinction drawn by some judges between the delegation of a duty and its performance.

As stated earlier, a duty cannot, strictly speaking, ever be delegated. It can only be performed. Quite correctly, therefore, (if it may be said with respect) the Court of Appeal in the *Riverstone* case held that the shipowners' duty had not been delegated but performed when the ship was entrusted to reputable ship repairers. Yet we are told: " If owners choose to entrust to others, be they experts or servants or agents, the duty which the owners must themselves discharge, then the owners are liable if their delegates fail to do what it is incumbent on the owners to do " (*per* Morris L.J. at

p. 97). But what duty can it be that the owner must himself perform? What is it, in the physical world, that the owner himself, and no one else, must do? Whatever the operation I wish undertaken, unless it is bound inevitably to cause damage (in which case I am myself negligent in having it done), I have not personally failed to take care if I entrust the work to a reputable person competent to undertake it and also carry out such supervision as the circumstances require. Whether or not I am under a specific duty to supervise or provide supervision will depend on the circumstances (this is recognised, for example, in section 2 (4) (*b*) of the Occupiers' Liability Act, 1957); but if I am under such a duty, then I shall be liable for negligent supervision, no matter who it is that I actually appoint to supervise. But there would seem to be nothing other than supervision that a man can be absolutely bound to do himself, or take the risk of his delegate's negligence, unless his duty is to see that care is taken. But this, *ex hypothesi*, it is not. It is suggested, therefore, that the duty imposed by law upon masters and shipowners, and perhaps also upon other classes of person, is not simply a duty personally to take care, nor yet a duty to see that care is taken. It is a duty personally to take care and also to provide non-negligent supervision.

Whether this be correct or not, one thing seems to stand out as the result of our trilogy of cases. Whereas previously it was thought that all situations either involved liability for the negligence of "independent contractors" in general, or else did not, it is now clear that there can be liability for some kinds of "independent contractors" and not for others. This result depends upon the existence of a duty intermediate between the duty personally to take care and the duty to see that care is taken. The discovery of such a duty is an important step forward in the development of this branch of the law.

J. A. Jolowicz.

NEGLIGENCE—RESCUE—NEGLIGENCE OF PERSON IN PERIL

The decision of Barry J. in *Baker* v. *T. E. Hopkins & Son, Ltd.* [1958] 1 W.L.R. 993, noted in [1959] C.L.J. 23, has been affirmed by the Court of Appeal: [1959] 1 W.L.R. 966; and the application of *Haynes* v. *Harwood* [1935] 1 K.B. 146 to the facts of the case was approved. The Court of Appeal did not, however, find it necessary to consider whether the defendants were also liable on the ground that their servants, whom the plaintiff's husband had attempted to rescue, having negligently put themselves into a position of danger, had been guilty of negligence in the course of

their employment. Apart from Barry J.'s dicta on the subject, therefore, this question remains undecided.

J. A. Jolowicz.

NUISANCE—NON-FEASANCE—STATUTORY DUTY—DRAINAGE

In *Attorney-General* v. *St. Ives R.D.C.* [1959] 3 W.L.R. 575 the plaintiff was a farmer in the parish of Holywell in the county of Huntingdon whose land had been seriously flooded from time to time partly as the result of the non-repair of two drains which ran adjacent to and through the land. By an award made in 1803 commissioners, appointed under an Enclosure Act of 1800 relating to the parish of Holywell, ordered that the drains in question and others should be maintained by the surveyor of parish highways. These duties were transferred by the Highway Act, 1862, s. 11, to the highway board for the district and thence by the Local Government Act, 1894, s. 25, to the rural district council. It was undisputed that between 1894 and the passing of the Local Government Act, 1929, the duty to maintain and repair the drains lay on the rural district council. No work had been done on the drains since 1947; they were choked and silted. The plaintiff and the Attorney-General on relation of the plaintiff claimed (1) a declaration that the St. Ives R.D.C., or alternatively the Huntingdon County Council, were bound to maintain the drains and keep them in repair; and (2) damages against one or other of the councils.

By the Local Government Act, 1929, s. 30 (1), the county council was made the highway authority for all rural districts in the county and as such had " all such functions under the Highways Acts, 1838 to 1885 " as were exercisable by rural district councils as successors to highway boards, and rural district councils ceased to be highway authorities. The proviso to section 30 (1) enacts that " nothing in this section shall affect . . . any functions not being functions with respect to highways " which were exercisable by rural district councils.

Salmon J. held, on the facts, that the drains were part of the land drainage as distinct from the road drainage scheme, and their maintenance and repair were not functions with respect to highways within the meaning of section 30 (1). Accordingly, the duty to maintain and repair the drains remained on the St. Ives R.D.C. and had not been transferred to the Huntingdon C.C. The St. Ives R.D.C. contended that failure to maintain and repair the drains was non-feasance and that accordingly they were immune from liability. At common law the duty of repairing highways was on the inhabitants of the parish at large, and no action for damages

for negligent non-repair of the highway could be brought against the parish by an individual who had suffered special damage in consequence of the neglect to repair. The only remedy against the parish was by way of indictment. (The Highways Act, 1959, s. 59, now provides that no indictment shall be preferred in respect of neglect to maintain a highway, and substitutes a more modern and prosaic procedure for the enforcement of liability for maintenance.) The Highway Act, 1835, s. 6, merely enabled the parish to conduct its work through the surveyor; its object was not to create any new liability on the parish or on any other person, but to promote machinery whereby the existing duty of the parish to repair could be more conveniently fulfilled. The duty of the surveyor was not to the public but to the parish who employed him and for breach of that duty the Act provided a penalty, not an action or an indictment: *Young* v. *Davis* (1863) 2 H. & C. 197. When responsibility for the maintenance of highways was transferred by various statutes to local government authorities, the House of Lords held in *Cowley* v. *Newmarket Local Board* [1892] A.C. 345 that they too were immune from liability for non-feasance. This is justified on analytical grounds by the rule that no action for damages lies for breach of a statutory duty unless the statute clearly intends to impose such liability: *Municipality of Pictou* v. *Geldert* [1893] A.C. 524, 527. Salmon J. agreed that there is historical justification for non-liability for non-feasance, but regards the rule as "an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity." Had these two drains been designed to drain the highway, he would have applied the non-feasance rule. But the duty of repairing these drains was not originally on the inhabitants at large, but was cast upon the surveyor by the award made under the Enclosure Act, 1800. "Neither the inhabitants at large nor the surveyor were liable, nor are their successors liable, to be indicted in respect of their failure to maintain and repair the drains." The rule of immunity from liability for non-feasance only extends to highway authorities who are "really the successors of and have really had transferred to them the duties and liabilities which originally rested on the inhabitants": *Swain* v. *Southern Ry.* [1939] 2 K.B. 560, 574, *per* Finlay L.J. There was no reason for extending the rule to the St. Ives R.D.C., and consequently they were held liable. The mere fact that the defendant has a duty to repair the highway is not enough; thus railway and canal companies are liable for failure to repair highways for which they are responsible (*ibid.*). The immunity only attaches to these duties imposed on highway authorities *qua*

highway authorities. " The question is not, . . . whether the body which is sought to be made liable for non-reparation is or is not the same body as that which is responsible for the maintenance of the road, but whether the particular alleged nuisance or injury which they have permitted is one which they have done in their capacity as repairers of the road or in carrying out their obligations or powers under some different statute ": *Skilton* v. *Epsom & Ewell Urban District Council* [1937] 1 K.B. 112, 123, *per* Slesser L.J.

The final point for decision was whether the duty to maintain and repair the drains imposed by the Enclosure Act, 1800, and the award made thereunder was owed to the party aggrieved as well as to the state, or was a public duty only. That depended on the intention of the legislature, which was to be gathered from the whole of the Act, and from the circumstances, including the pre-existing law, in which it was enacted. " Where a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally, a right of civil action accrues to the person who is damnified by its breach. For if it were not so, the statute would be but a pious aspiration ": *Cutler* v. *Wandsworth Stadium, Ltd.* [1949] A.C. 398, 407, *per* Lord Simonds. As the Enclosure Act, 1800, and the award thereunder imposed no penalty or other sanction for non-compliance, Salmon J. concluded that the Act was passed and the award made for the benefit of the persons in favour of whom the enclosures were made, namely, the persons whose land is immediately adjacent to the drains and through whose land the drains passed. The plaintiff was, therefore, entitled to a declaration as prayed and to damages against the St. Ives R.D.C.

It may be added that a clear and critical review of the immunity of highway authorities for non-feasance is made in *Buckle* v. *Bayswater Road Board* (1936) 57 C.L.R. 259, 278–296 by Dixon J.; *Gorringe* v. *The Transport Commission* (1950) 80 C.L.R. 357, 373–381 by Fullagar J., and by Professor Sawer in (1938) 12 Austr. L.J. 231–233 " Non-Feasance in Relation to ' Artificial Structures ' on a Highway," and in (1955) 18 M.L.R. 541–556, " Non-Feasance Revisited."

T. Ellis Lewis.

FATAL ACCIDENTS ACTS—VOLUNTARY PENSION—PROMOTION OF MASTER'S GENEROSITY

The main question in *Jenner* v. *Allen West & Co., Ltd.* [1959] 1 W.L.R. 554 (C.A.) was, no doubt, whether the defendants, the

employers of a workman who was killed in the course of his employment, were or were not liable for causing his death; but that question need not detain us. It having been established that they were liable (as the Court of Appeal held, to the extent of one-third) the second question arose, whether there could be deducted from the amount due to the plaintiff, his widow, under the Fatal Accidents Acts as they then stood, a voluntary pension which had been paid by the defendants to her at the rate of £10 10s. 0d. per week for the first eight months after his death and thereafter at the rate of £5.

At first instance Gorman J. held that the benefit received by the widow from this voluntary pension should not be brought into account; on appeal the Court of Appeal held that it should be. The case on the negative side was *Peacock* v. *Amusement Equipment Co., Ltd.* [1954] 2 Q.B. 347, the case on the positive side was *Mead* v. *Clarke Chapman & Co., Ltd.* [1956] 1 W.L.R. 76, both being decisions of the Court of Appeal. The point at issue was whether there was a "sufficient causal connection" between the death and the voluntary bounty of the defendants to make the pension, though voluntary, a benefit to the widow resulting from the death and thus require it to be set off against the loss which the same death has caused to her.

On this kind of causation point, one view is almost as good as the other. Gorman J., on the evidence before him, was certainly not perverse in holding that the causal link between the death and the payment had not been made out to his satisfaction; but as certainly the Court of Appeal was not perverse in overruling him. It is rather like the case of a black and white chessboard: it is mainly a trick of our eyes—and a momentary and shifting trick—whether we see it as a series of white squares on a black ground or of black squares on a white ground. We can see it, with the utmost conviction and certainty, both as the one and as the other. However, we like to bolster up our view of the situation either with a clinching metaphor or with a cogent if extraneous reason. One of the members of the Court of Appeal did justify his conclusion that the pension should be brought into account with this extraneous reason (p. 569): "I add that to hold otherwise *in such a case as the present* (italics added) would appear to me not to be in the interests of public policy, since it would inevitably be likely to discourage voluntary payments of this kind which considerate employers might feel some conscientious obligation or inclination to make."

This reason deserves attention. If the employer has to pay out of his own pocket both the voluntary pension and the Fatal

Accidents Acts damages it may well be prudent, in the interest of widows, to allow him to set off the one against the other when he bears the cost of both. The Court of Appeal loyally following the decision of the majority of the House of Lords in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* [1957] A.C. 555, noted in [1957] C.L.J. 21, are no doubt bound to hold that the legal liabilities between a master and his servant are not affected by any contract of insurance taken out by the master. But are they really bound to ignore the facts of life, and of insurance, when speculating upon the effect of their judgment upon the actual conduct of actual employers?

The defendant employer in *Jenner's* case was a firm which employed 100 men in Jenner's department alone—their maintenance department. It is frankly incredible that such a firm today would not be covered by insurance in respect of their employers' liability risks. If they are so covered, all sums which Mrs. Jenner can legally obtain from them under the Fatal Accidents Acts will in fact be provided by the insurers. That means that any deduction made from such sums redounds only and immediately to the advantage of the insurers. In particular, if the decision of the Court of Appeal is correct, any voluntary payment which the board of directors made to the widow out of the *company's funds* "in recognition of what I ventured to call during the course of the argument an obligation of humanity towards the widow of an old and well-tried servant who has been killed in their service in the course of employment," so far from giving any additional benefit to the widow merely reduced any payment which might fall to be made by the insurers.

It is hard to suppose that any board of directors, however kindly disposed to the widows of well-tried servants, will be stirred to generosity by a consideration of the relief they will be affording to hard-pressed insurers. Surely they are more likely to be generous if their generosity actually benefits the widow. By neglecting the brute fact of insurance the Court of Appeal's decision, in a case such as *Jenner's* where there is a legal liability under the Fatal Accidents Acts, is topsy-turvy in the actual world of industrial relations as they exist today—at least to the extent to which that decision may have been motivated by one of the reasons expressed for it, the desire to encourage employers to show generosity towards the dependants of faithful servants.

On the specific point decided, the ill-effects of *Jenner's* case have, within six months, been corrected by the Fatal Accidents Act, 1959, which, by section 2 provides that such pensions or gratuities shall no longer be brought into account, but that Act unfortunately leaves

untouched the general question whether the court, in judging of public policy and the effect of their own decisions, should have regard to contracts of insurance.

C. J. Hamson.

COMPANY LAW—BENEFICIAL INTERESTS IN SHARES

The two cases considered in this note, *Lyle & Scott, Ltd.* v. *Scott's Trustees* [1959] A.C. 763 (H.L.), and *Australian Fixed Trusts Pty., Ltd.* v. *Clyde Industries, Ltd.* (1959) S.R.(N.S.W.) 33 (a decision of the Supreme Court of New South Wales), featured two of the newer phenomena of company law: the take-over bidder and the unit trust. The cases have little in common (except perhaps that they emphasise how important the drafting of a company's articles may later be in resolving domestic disputes) and the decisions may have added little to substantive company law; but both cases raise incidentally a most interesting question—is a company entitled to concern itself with *beneficial* interests in its shares?

The *Lyle & Scott* case dealt with the problem which faces a take-over bidder who wishes to buy a controlling interest in a private company. Private companies always restrict the right of their members to sell their shares; very frequently, as in *Lyle & Scott*, "pre-emptive" rights are conferred on the other members. A member may not sell his shares to an outsider, but must offer them first to the other shareholders. Where, as in this company, this obligation is imposed upon any shareholder who is "desirous" of transferring his holding, the task of a take-over bidder will indeed be difficult. A bidder necessarily wishes to acquire the shares, and any member who negotiates with him will almost certainly manifest a "desire to transfer" as soon as any step is taken towards reaching (by however devious a route) that object.

The House of Lords in this case ruled that the respondent shareholders had shown themselves "desirous of transferring" their shares by concluding an agreement to sell, and handing over proxies and share certificates in return for the offered price, notwithstanding their sworn averment that they did not then intend to execute any transfer. The decision itself was therefore simply on a question of construction, and cannot be regarded as authority for what a future bidder may or may not do, since the wording of articles varies from company to company.

Even an article in this language may not, however, completely close the way for a purchaser. This note does not afford scope for a full discussion of the courses which might be open. (Some are

discussed by Dr. Rice in (1959) 23 Conv.(N.S.) 42.) It must be remembered that a bidder making a successful take-over offer can stipulate for the support of 75 per cent., or more, of the members' votes, and may therefore procure an amendment of the articles as a step towards accomplishing his object. Could not a bidder openly approach the shareholders as follows: "I should like to make an offer for your shares, but do not desire to do so unless I can do so lawfully. Will you therefore vote in favour of the alteration of the articles proposed by X [a sympathetic shareholder prevailed upon to do so] and then I shall make you a firm offer to buy at not less than £3"? Such an alteration was upheld as valid in *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1951] Ch. 286.

Furthermore, it must be borne in mind that no case has yet decided that a member of a private company has infringed a pre-emptive rights clause by alienating only the beneficial interest in his shares—declaring himself trustee of the shares for X. It is true that Lord Keith in the *Lyle & Scott* case (at p. 785) and Lord Sorn in the court below (1958 S.C. 230, 250–251) thought that to sell or purport to sell the beneficial rights without the title to the shares was a breach of the article under consideration; but in *Lyle & Scott* it was anticipated and, indeed, agreed that the legal title should be transferred in due course, and it was by virtue of this "complete and unrepudiated contract of sale and acceptance of purchase-money" that the assignment of beneficial rights occurred. It is submitted that regard should be had to these special circumstances in construing the passages referred to.

This raises a further question: *can* a private company lawfully endeavour to prevent a shareholder from dealing with the beneficial interest in his shares? Is this not contrary to the longstanding principle of company law that the beneficial rights in its shares are no concern of a company?

The answer to this question was very nearly provided by *Australian Fixed Trusts Pty., Ltd.* v. *Clyde Industries, Ltd.*, but, as it happened, McClelland J. did not find it necessary to decide the point. The directors of Clyde Industries, Ltd., seeing a threat to their management in the growing holdings of unit trusts in the company, had attempted to have the articles altered by adding a provision that any member who held his shares as a trustee for holders of units in "any public unit or flexible trust or public investment trust" should not be able to cast a vote as such shareholder without first obtaining the direction of a majority of the holders of units in the trust. The directors of the company were empowered to determine conclusively whether the new article had

been complied with. McClelland J. ruled that the effect of the alteration was to discriminate against the trustee shareholders by giving them a more restricted, and therefore less effective, voting right, and that there were no grounds on which reasonable men could decide that the alteration was for the benefit of the company as a whole; and accordingly he declared the alteration invalid as a fraud on the minority. In doing so the learned judge simply applied the established formulae laid down in *Greenhalgh* v. *Arderne Cinemas, Ltd.* (*supra*) and *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.* [1927] 2 K.B. 9. The decision itself, therefore, is not of special interest.

It is unfortunate, however, that the learned judge did not deal with a further objection to the proposed alteration—that the article would *require* the company to become aware of equitable interests in its shares, which was contrary to statute and principle. The same question was, as we have seen, raised in a slightly different form by *Lyle & Scott's* case. Is a company entitled to regulate dealings in the beneficial ownership of its shares? May a company dictate by its articles the way in which a trust affecting its shares shall be internally managed?

It should be noticed first that section 117 of the Companies Act, 1948, does not provide (as did section 19 of the Joint Stock Companies Act, 1856) that notice of a trust shall not be receivable by the company; it states merely that no notice shall be entered on the register of members. It may be argued, however, that this section forbids the keeping of *any* register of beneficial interests; and support for this could be found in *Re W. Key & Son, Ltd.* [1902] 1 Ch. 467.

Apart from the statute, it is arguable that on principle it would be repugnant to established company law and practice to permit a company to require to be given notice of trusts. Section 117 and a large number of decided cases, and commonly a company's articles, together afford the company an extensive measure of protection against notice of trusts. Could a company consider itself free to abandon this protection? Passages in *Re Perkins* (1890) 24 Q.B.D. 613, 616 and *Re Bell Bros., Ltd.* (1891) 65 L.T.(N.S.) 245, 248 suggest that as a matter of principle a company is not only not *bound*, but also not *entitled*, to concern itself with trusts of its shares. Certainly as a matter of policy, to require notice might well involve the company in more trouble than the added article was worth. What notice would the company require? The directors of Clyde Industries, Ltd., would have needed notice not only of the existence of the trust but also of its terms and the

beneficiaries' names. Would the company not run a serious risk of being continually involved constructively in breaches of trust?

In any event, even if notice were required, the object of the article could very probably be defeated by creating a double trust. English law in the past has had recourse to a use upon a use, and trusts of a beneficial interest are not unknown today. If the custodian trustees of the Australian Fixed Trusts company had assigned their legal estate to a nominee on trust for themselves, and then themselves held the beneficial estate on the trusts of the investment scheme, the terms of the proposed article would not have reached them.

L. S. Sealy.

TRUSTS OF PERSONALTY—DISPOSITION OF INTERESTS—FORMALITY

Primarily the decisions in *Grey* v. *I.R.C.* [1960] A.C. 1 and *Oughtred* v. *I.R.C.* [1959] 3 W.L.R. 898 render avoidance of stamp duty on settlements of personalty more difficult, but they incidentally reveal many doubts concerning the formalities needed for disposing of equitable interests in personalty. Section 53 (1) (*c*) of the Law of Property Act, 1925, provides that "a disposition of an equitable interest or trust subsisting at the time of disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will," but section 53 (2) adds that "This section does not affect the creation or operation of resulting, implied or constructive trusts." Section 53 (1) (*c*) replaces section 9 of the Statute of Frauds, 1677, which provided that "all grants and assignments of any trust or confidence shall . . . be in writing . . ."

Equitable assignments of equitable interests in personalty may be made in at least five ways (see *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645, 664, *per* Romer L.J.). The grantor may: (1) assign his interest direct to the grantee; (2) declare himself a trustee for the grantee; (3) direct his own trustees to hold for the grantee; (4) contract for value to assign to the grantee; (5) combine (1) and (2) by assigning his interest to new trustees for the grantee. Of these methods (1) and (5) require writing under section 53 (1) (*c*). Whether method (2) so requires depends on the unresolved question posed in the penultimate sentence of this note, although a *legal* owner may declare a trust orally (*M'Fadden* v. *Jenkyns* (1842) 1 Phillips 153, 157). Method (3) undoubtedly constitutes an effective assignment (*Bentley* v. *Mackay* (1851) 15 Beav. 12; *Re Chrimes* [1917] 1 Ch. 30), but what formalities it requires had never been decided before *Grey's* case, which decides

that it requires writing. Under method (4) the contract will be specifically enforceable if damages would not be an adequate remedy—*e.g.*, on a sale of shares in a company, but not of stock in the public funds, since the former are not, whilst the latter are, readily available on the market: Fry, *Specific Performance*, 6th ed., 33–36. Such a contract must confer an equitable interest on the purchaser; but is the vendor's equitable interest transferred to him, or extinguished, or retained on a constructive sub-trust for the purchaser who gets some new interest? The formalities required for such a contract may depend on the answers to these questions, which were inconclusively discussed in *Oughtred's* case.

In *Grey's* case H. transferred 18,000 shares in a company to trustees as his nominees; the transfer, passing no beneficial interest, was stamped 10s. Later H. directed those trustees to hold 3,000 shares on the trusts of each of six settlements previously made on his grandchildren. Five weeks later the trustees executed six declarations under seal (which H. also signed) reciting their title to the shares and H.'s oral directions, and acknowledging that they held the shares on the trusts of the respective settlements, of which they were also the trustees. H.'s oral directions were not dutiable since the Stamp Acts strike only at documents. But were those directions ineffective under section 53 (1) (*c*) for want of writing? If so, the later declarations under seal, to which H. assented, were themselves "conveyances or transfers operating as voluntary dispositions" of H.'s equitable interest and stampable *ad valorem* (£210 each) under the Finance (1909–10) Act, 1910, section 74 (1); otherwise they were stampable at 10s. under the Stamp Act, 1891, Sched. I, as mere "declarations of any use or trust" already created orally.

Upjohn J. held the word "disposition" in section 53 (1) (*c*) to be synonymous with the words "grants and assignments" in the Statute of Frauds. He thought a settlor's direction to his trustees to hold for another operated as a declaration of new trusts (like method (2) above) rather than as an assignment of his own equitable interest (method (1)). H.'s oral directions were therefore effective despite section 53 (1) (*c*), and the later declarations thus transferred no interest and were not stampable *ad valorem*. In the Court of Appeal Lord Evershed M.R. agreed with Upjohn J., but the majority reversed him. Ormerod L.J. admitted the presumption against a consolidating Act like the Law of Property Act, 1925, altering the law, but both he and Morris L.J. held that "disposition" in section 53 (1) (*c*) was a word of wider meaning than "grants and assignments" in the earlier Act. Though a direction to the trustees to hold for a new beneficiary determined, rather

than assigned, the grantor's interest, it was certainly a "disposition," and so ineffective without writing. The House of Lords unanimously affirmed that majority decision, but upon another ground. It was the Law of Property (Amendment) Act, 1924, Sched. III, para. 15, that substituted for the words of section 9 of the Statute of Frauds those now found in section 53 (1) (*c*) of the Law of Property Act, 1925, which merely consolidated the law *as so amended*. Hence no canon of interpretation prevented "disposition" receiving its broad natural meaning which certainly covered a settlor's direction to his trustees to hold for another, whether that operated by way of assignment, declaration of new trusts, or otherwise. Two learned commentators had already urged this view (74 L.Q.R. 487–489), but their invitation to clarify the oddly obscure position as to trusts of equitable interests (subtrusts) was not accepted by their lordships.

In *Oughtred's* case certain shares stood settled on O. for life and then for her son P. absolutely. On June 18 P. orally agreed with O. that on June 26 he would exchange his reversionary equitable interest for other shares owned by O., intending thereby to enlarge O.'s life interest in the settled shares into absolute ownership. On June 26 O. and P. by deed released the trustees, and recited the earlier oral agreement and that the settled shares were "accordingly now held by the trustees" for O. absolutely. The same day the trustees (and O. and P.) executed a transfer of the legal title to the settled shares to O., who then transferred her other shares to P.'s nominees. Was the transfer to O. a "conveyance or transfer on sale" liable to *ad valorem* duty under sections 54, 55 (1) of the Stamp Act, 1891, or merely a "conveyance or transfer of any kind not hereinbefore described," stampable at 10s. under the First Schedule?

Upjohn J. held that the oral agreement, being for value and specifically enforceable, constituted P. a constructive trustee of his equitable interest for O. Constructive trusts might arise orally under section 53 (2) of the Law of Property Act, 1925, despite section 53 (1) (*c*). He then held that the contract at once passed P.'s equitable interest to O. The same Court of Appeal as in *Grey's* case unanimously reversed him, accepting the fresh argument that, as the parties expressly intended, the transfer was the actual conveyance "consequent upon and in implementation of" the oral contract of sale, and so dutiable *ad valorem*. Further, the court did not accept Upjohn J.'s interpretation of section 53. The House of Lords affirmed the Court of Appeal's decision by a majority of three to two. Lord Jenkins, with whom Lord Keith of Avonholm agreed, held section 53 irrelevant, since whether or not

such a contract vests the entire beneficial interest in the property sold in the purchaser by way of constructive trust, any instrument employed to complete the transaction is stampable as a "conveyance or transfer on sale," even if it incidentally winds up the former trust. Lord Denning held more widely that every conveyance or transfer by which an agreement for sale is implemented is liable to *ad valorem* duty; but he did not think that section 53 (2) obviates the need for writing under section 53 (1) (*c*). Lord Radcliffe, dissenting, agreed with Upjohn J. that the oral contract validly created a constructive trust under section 53 (2), whereby P.'s equitable interest passed to O. before the transfer was ever executed. Lord Cohen, also dissenting, decided that P.'s equitable interest remained in him as a constructive trustee for O. and could only be transferred in writing under section 53 (1) (*c*). Although P. had probably not conveyed that interest to O. by a document capable of attracting duty, once O. had vested her own shares in P.'s nominees, P. could not dispute her absolute title to the former settled shares.

Thus the third of the methods of assignment described above now requires writing (*Grey's* case) and settlors must find other methods of avoiding stamp duty by oral transactions if they can. But *Oughtred's* case leaves some interesting problems unsolved. Must a contract to assign (method (4)) be in writing to create a constructive trust, despite section 53 (2)? Does an equitable owner who declares himself a trustee for another (method (2)) disappear from the scene, as Upjohn J. thinks, whilst the old trustees hold for the new beneficiary instead; or does he himself retain his interest on a sub-trust? The latter view, with respect, seems more logical and practical.

J. W. A. Thornely.

SALE OF GOODS—SELLER'S LIEN—RESALE

The right of an unpaid seller of goods to a lien over them until paid is liable to be defeated in any one of five ways. Under section 43 of the Sale of Goods Act, 1893, this occurs if (i) the goods are delivered to a carrier for transmission to the buyer, or (ii) the buyer obtains possession, or (iii) the seller waives his rights; and there are two further possibilities under section 47, where, though the seller's rights are not in general defeated by a mere sub-sale by the buyer, they are defeated (iv) if the seller has assented to such sub-sale, and (v) if the seller transfers a document of title to the buyer and he transfers "the document" by way of sale to a person who takes in good faith and for value. *D. F. Mount*,

Ltd. v. *Jay & Jay (Provisions) Co., Ltd.* [1959] 3 W.L.R. 537, is a valuable illustration of the limits of the fourth and fifth of these possibilities.

The defendants, who were the unpaid sellers, were the owners of 500 cartons of tinned peaches in store with a firm of wharfingers and they contracted to sell to the buyer 150 of these cartons and then, by a second contract, a further 100 cartons. The contracts were negotiated against the background of a falling market; as to the 150 cartons, the sellers agreed to let the buyer have these at a reduced price upon the terms that the profit on resale should be shared equally between them; and as to the other 100 cartons the buyer made it quite plain that he was going to pay for them out of moneys that he would receive on a resale. So, in order to enable the buyer to obtain delivery of the goods, the sellers sent him two delivery orders covering the two consignments, and these he sent to the wharfingers with instructions to hold to his order. Meanwhile, having resold both consignments to the plaintiffs (the sub-buyers), the buyer made out a fresh delivery order in their favour covering all 250 cartons and sent it to them, and they in turn sent it to the wharfingers with instructions to hold for them. The sub-buyers paid the buyer but he failed to pay the sellers, who thereupon instructed the wharfingers to hold the goods to their order. Faced with the competing claims of the unpaid sellers and the sub-buyers, the wharfingers took out an interpleader summons and the crucial question was whether the unpaid sellers had lost their lien. This had not occurred under any one of the first three methods mentioned above, but it was argued that either or both of the ways envisaged by section 47 had been satisfied.

Had the sellers "assented" to the sub-sale? Yes, said Salmon J. who adopted the words of Pickford J. in *Mordaunt* v. *British Oil & Cake Mills, Ltd.* [1910] 2 K.B. 502, 507, where he said that it must be "such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods." On the present facts it was clear that the sellers had assented to the resales and were content with their remedy against the buyer personally. Though this was sufficient to dispose of the case, two further matters argued by counsel deserve noting. First is the argument on behalf of the sub-buyers that, even if the sellers had not assented to the sub-sales, yet there had been a transfer of a document of title by the sellers to the buyer and a sub-transfer to the sub-buyers which, under section 47, would operate to destroy the lien. To this the judge answered that section 47 required that the buyer should transfer "*the* document" that he received from his sellers, whereas here the buyer sent that document to the

wharfingers and originated a fresh delivery order in favour of the sub-buyers. The strict terms of section 47 had not, therefore, been complied with and the sellers would not, on this ground alone, have lost their lien.

The second point raised by the sub-buyers was that section 25 (2) of the Act provides yet a sixth way in which the lien may be lost. Now the primary role of this subsection is to provide one of the important exceptions to *nemo dat quod non habet*. Its role is to enable a person to pass a better title than he has himself if, having agreed to buy goods, he obtains possession of them or the documents of title to them and then resells the goods delivering "the goods or documents of title" to a sub-buyer who takes for value and without notice of any lien of the original seller. There is, indeed, some authority for the view that the operation of section 25 (2) may also defeat the seller's lien: see *per* Collins L.J. in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co., Ltd.* [1899] 1 Q.B. 643 at 664; for the opening words of section 47, "Subject to the provisions of this Act," indicate that the grounds in section 47 are not the only ones on which the seller's lien may be defeated. Salmon J. therefore proceeds on the basis that the provisions of section 25 (2) are such other provisions and, comparing them with those of section 47, says that in his view they are "less rigorous" and that, in particular, section 25 (2) does not require that the buyer should transfer the identical document that he himself received, and that therefore the transfer before him would have extinguished the lien. The point is a novel one. *Benjamin on Sale* (8th ed., p. 865) says "Under both sections the buyer must transfer the document to a third person," but this statement points equally well in either direction. It might be thought, however, that, since both sections are here being used for the same purpose, they ought to be given the same strict or the same benevolent interpretation.

T. C. Thomas.

Sale of land—vendor's rescission clause—mortgages

The case of *Baines* v. *Tweddle* [1959] Ch. 679 is concerned with the effect on a contract for the sale of land of the following familiar condition:

> "If a purchaser takes or makes any objection or requisition as to title, conveyance or otherwise which the vendor is unable or, on the ground of unreasonable expense, unwilling to remove or comply with, and does not withdraw the same . . . the vendor may rescind. . . ."

The defendant vendor had agreed to sell a piece of agricultural land to the plaintiff purchaser. The nature of the interest sold was not expressly stated, but there was no dispute that the bargain was for the unincumbered fee simple. In fact the vendor had created two mortgages over the land, the first in favour of a building society, the second in favour of one Abrahams. The vendor believed that the mortgagees would join with him in the conveyance to the purchaser, but no mention was made of the mortgages in the contract, and the purchaser was not told of them until a month later, by which time he had paid the whole of the purchase-money and gone into possession as originally agreed, although the conveyance had not yet been executed. The vendor was seriously in arrears with the instalments on the first mortgage, and neither of the mortgagees was willing to join in the conveyance. The vendor offered the purchaser a conveyance subject to the two mortgages, but this offer was refused as a worthless one, the charges exceeding the value of the property. The vendor thereupon called on the purchaser to withdraw his objection within ten days, and on his failing to do so, purported to rescind, relying upon the clause set out above. The plaintiff sued for specific performance, or alternatively for damages for breach of contract. The defendant contended that he was entitled to rescind, and Vaisey J. upheld his contention, awarding him £100 agreed damages in respect of the plaintiff's occupation of the land, and dismissing the plaintiff's suit for specific performance. The Court of Appeal allowed the plaintiff's appeal, awarding him damages, specific performance not being possible.

Lord Evershed M.R. and Pearce L.J. doubted whether the clause in question applied to the situation that had arisen, but even assuming that it did, they agreed with Charles Romer L.J. that the defendant could not rely upon it because of his recklessness.

The first question was whether the clause was prima facie applicable. Doubt arose in the minds of two members of the court because the objection was so radical and extensive. Lord Evershed M.R. regarded a previous Court of Appeal case, *Re Jackson & Haden's Contract* [1906] 1 Ch. 412, as inconclusive, as in his view only Collins M.R. delivered a clear opinion that the clause was applicable, while Robert Romer and Cozens-Hardy L.JJ. were doubtful. In fact, Cozens-Hardy L.J. states clearly that the question was one of title, and therefore within the clause (p. 425), while Romer L.J. expresses with equal clarity the contrary view (p. 424). Having regard to the majority opinion, and the fact that, if anything, the objection was more radical than in the instant case, relating as it did to the mines and minerals in which the vendor

had no rights, it would seem that there was clear authority, though doubtless *obiter*, to support the conclusion reached in the present case that the clause was applicable. Further, the clause does refer to objections to conveyance as well as to objections to title, whereas the clause in the 1906 case did not refer to conveyance at all, and the objection in question in the 1959 case might well be regarded as to conveyance, even if not as to title. In another Court of Appeal case, *Re Deighton & Harris's Contract* [1898] 1 Ch. 458, the clause referred expressly only to objections as to title, but rescission under the clause was granted for a persistent objection as to conveyance in view of a general reference in the clause to " any other matter or thing relating to the sale." It may be mentioned that if the vendor has no title at all, he cannot rely upon such a clause: *Bowman* v. *Hyland* (1878) 8 Ch.D. 588.

Assuming, as the court did, that the clause was prima facie applicable, it then fell to be decided whether the vendor could avail himself of it. Clauses of this kind have often been before the courts, and decided cases have imposed some limitation on the apparently unqualified right to rescind. It has been held that such a clause confers no arbitrary right to rescind, and it has further been decided that a vendor guilty of recklessness cannot escape from his bargain by pleading such a clause. It must be stressed that mere carelessness or inadvertence, as distinct from the state of mind of recklessness, that is to say a subjective realisation that certain consequences may follow, is insufficient to preclude the vendor from relying on such a clause. This warning is necessary, because both Charles Romer and Pearce L.JJ. quote from the judgment of Collins M.R. in *Re Jackson* (*supra*) a passage which suggests that doing less than an ordinarily prudent man would do will deprive the vendor of the protection of this clause. However, the judgment of Collins M.R. considered as a whole shows that the vendor in that case well knew that he was not entitled to the minerals, and this knowledge, establishing the mental state of recklessness, was also present in *Nelthorpe* v. *Holgate* (1844) 1 Coll. 203, the authority upon which *Re Jackson* was founded. An isolated passage cited by Romer L.J. from *Merrett* v. *Schuster* [1920] 2 Ch. 240, torn from its context, may indicate that an *inadvertent* vendor may not rescind under such a clause, but the entirety of the judgment requires nothing less than knowledge by the vendor of the defects of his title. It is clear that in the instant case Evershed M.R. requires and finds subjective realisation of the difficulties on the part of the vendor, before he is to be debarred from relying on the clause. He states that the fact of the arrears was one which " he in his own mind

thought might possibly make the building society not entirely amenable " (p. 685). The emphasis in this passage is clearly on the subjective aspect, the hallmark of recklessness, as distinct from the objective test of the ordinarily prudent man. The vendor knew the property was incumbered, knew that the purchaser was unaware of this, knew that the long-suffering first mortgagee might not be amenable, and though he honestly believed that his solicitor could clear up the difficulties, he had received no assurance to that effect. He realised the possible consequences, and was therefore reckless, despite his over-sanguine expectation that all would end well. The court leaves open the question whether, had his solicitor recklessly given him such an assurance, the ordinary principles of vicarious liability would have prevented the vendor himself from relying upon the clause.

In the outcome the court awarded damages to the plaintiff purchaser. The measure of damages is not discussed in the report. It may be mentioned that the purchaser would be entitled to damages for loss of bargain, if he had suffered any such damage. The situation was not one in which the vendor could rely upon the well-known rule in *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158, and limit damages to out-of-pocket expenses incurred by the purchaser, on the ground that he was unable to convey because of a defect in title. In *Re Daniel* [1917] 2 Ch. 405 it was held that where the property to be sold was under mortgage, and the mortgagee refused to join in the conveyance, this was not a defect in title, but a matter of conveyancing. The vendor therefore had to pay full damages to the purchaser under the ordinary rules of the law of contract, and it made no difference that he had agreed to sell land and not goods. This was regardless of the fact that the vendor had had quite a reasonable expectation that his mortgagees would join (p. 408). In the instant case, however, as has been seen, the vendor had no such reasonable expectation, and there might appear to be an additional reason why he could not rely on *Bain* v. *Fothergill*, in that he had been guilty of recklessness. But in the famous House of Lords case, Fothergill, the vendor, was probably reckless, and yet avoided liability for full damages. He knew that a certain consent to the sale had to be obtained from the head landlord, but when the sale to the plaintiff was negotiated, according to the facts of the special case, either this fact did not cross his mind (a state of inadvertence), or he forbore to mention it feeling sure that no difficulty would arise (a state of recklessness). The court did not regard it as vital to determine his actual state of mind, as he was honest. Tweddle in the 1959 case was also held to be honest, so that like Fothergill he would not have been

liable to pay damages for loss of bargain, had the defect been one of title as distinct from one of conveyance.

R. N. Gooderson.

LEASE—WEEKLY TENANCY—REPAIRS

It is rather surprising that an elaborate written tenancy agreement should leave it uncertain whether the landlord has assumed an obligation to keep the premises in repair; but this was the situation which led to *Sleafer* v. *Lambeth Metropolitan Borough Council* [1960] 1 Q.B. 43 and the Court of Appeal's decision is of value for the light it throws on the position of a landlord whose agreement is silent on the point.

The Council had let a flat to the plaintiff on a weekly tenancy, the terms of which required him "to reside in the dwelling," not to do "any decorative or other work" to it without the Council's written consent, and to deliver it up at the end of the tenancy in "good and tenantable repair and condition." The agreement reserved a right of entry to the Council to execute repairs, and, although it did not impose an express obligation on them to do so, the Council in practice carried out nearly all necessary repairs. After a time the front door of the flat started to jam and some force was required to close it. The tenant complained to the landlords but the defect was not rectified, and one day when the tenant pulled hard on the knocker to close the door from the outside the knocker came away, he fell backwards, and was injured.

Clearly the tenant had no claim against his landlords in tort; and the rent of the flat was too high for a statutory condition of fitness for habitation to be implied in the agreement by the Housing Act, 1957, s. 6. But the tenant argued that a term should be implied at common law, relying strongly on some observations of Somervell L.J. in *Mint* v. *Good* [1951] 1 K.B. 517, 521. There a wall of a house which was let on a weekly tenancy had collapsed and injured a boy on the highway, and it was held that because the landlord must be considered to have had an implied right of entry to perform repairs he was liable to the boy in nuisance. Somervell L.J. had used these words: "Both sides must contemplate as the basis of the contract that the house will be kept in a reasonable and habitable condition by the landlord and not by the tenant. . . ."

This passage had led some writers to suggest that in the absence of express provision the landlord in a weekly tenancy was under an implied repairing obligation, but Morris L.J. now

corrected this error, pointing out that immediately after the passage quoted Somervell L.J. stated that, although the landlord has a *right* to enter to repair, he does not *bind* himself to do so. Thus as a general principle the landlord is under no implied obligation to repair the premises even in a weekly tenancy; and the dispelling of this misunderstanding of *Mint* v. *Good* is the most important feature of the present case.

It was argued, however, that special considerations applied in the particular circumstances of this tenancy. Here the tenant was expressly required to live in the flat, to do no work to it without written consent, and yet to deliver it up at the end of the tenancy in good repair; surely therefore to give efficacy to this contract a term had to be implied that the landlord would make the flat reasonably fit for human habitation. But Morris L.J. found it "quite impossible" to do so; and Ormerod L.J., although he was prepared to envisage situations which would require such a term to be implied, did not consider that this was one. Willmer L.J. on the other hand thought there was "much to be said for the view" that the requirement in this agreement that the tenant should reside in the flat obliged the landlord to do such repairs as would make this possible (though such an obligation would not, he was satisfied, extend to the "very trivial repair" that was called for here).

All the members of the court were therefore in agreement that the tenant's appeal failed; but their difference of opinion on this last point is of interest, for it reflects the somewhat inconsistent attitude which the courts have tended to adopt towards the question of a landlord's implied responsibility. In *Smith* v. *Marrable* (1843) 11 M. & W. 5 Parke B. stated that in every letting of a house a condition was implied that it was in a habitable state; but a few months later in *Hart* v. *Windsor* (1843) 12 M. & W. 68 he cut down this principle to the letting of a furnished house. Since then it has been generally accepted that no implied undertaking is given in the case of an unfurnished house, and Parliament has felt obliged to intervene in the case of houses let at relatively low rents (Housing Acts, 1936, 1957). The reason for the privileged position of the furnished house appears to lie partly in the shortness of the tenancy for which it is generally let (it seems from *Chester* v. *Powel* (1885) 52 L.T. 722 that the undertaking will not be implied in a substantial lease) but partly in the evident intention of the parties that the house should be lived in at once. Now this second reason suggests that a similar undertaking might be implied when an unfurnished house is let for immediate occupation; moreover the suggestion

becomes stronger when the tenant is expressly required by the agreement to live in it; and stronger still when merely a flat is involved, for then the tenant is handicapped by being unable to make a full survey beforehand or to reconstruct the flat afterwards if the building turns out to be structurally unsound. If then the courts are prepared (as they have been for over a century) to imply an undertaking of fitness for habitation in the letting of a furnished house, they would appear to have ample justification for doing so in addition in certain other situations, of which the present might well have been one.

J. C. Hall.

LICENCE—REVOCATION—TRESPASS

Armstrong v. *Sheppard & Short, Ltd.* [1959] 2 Q.B. 384 is, at bottom, a straightforward decision on the revocability of a non-contractual licence for the use of land. But a number of interesting points on rights and remedies were also involved, and some of them are not altogether easy to unravel in the report of the case.

The company had constructed a sewer and manhole on a strip of land which, as it turned out, belonged to A. A had been asked if he had any objection, and replied (orally) in the negative; but at that time he did not know that he owned the strip. Later, when aware of his title, he demanded that the sewer and manhole be removed and damages paid for the trespass. Later still, not receiving satisfaction, he brought an action in the county court for damages for trespass and for an injunction against the use of the sewer. He obtained nominal damages of £1 for trespass up to the date of the hearing, but he was refused an injunction. The Court of Appeal upheld both limbs of this judgment, dismissing an appeal and a cross-appeal. The reasons for refusing the injunction were that the damage was trivial and admittedly caused no inconvenience whatever, and that, moreover, A had attempted to mislead the other party and the court by denying his original oral acquiescence. The result was, therefore, that it was a trespass for the company to use the sewer, but they were not specifically forbidden to do so. When equity thus refuses to come to the aid of the common law, the crucial question is the measure of damages. A repetition of the offence would, on the one hand, be innocuous in fact; but on the other, it would defy the law, and might justify exemplary damages.

The remaining points in the case may be summarised as follows. First A's oral acquiescence was at most a bare licence, so that it was revocable at any time. There was no contract which could (if specifically enforceable) give the company any claim in equity

to an easement; still less was there any grant which could support such a claim at law. Secondly, the company could not invoke the equitable doctrine laid down in such cases as *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, to the effect that a licensor who allows the licensee to spend money on works on the licensor's land, to be used for a particular purpose, may be restrained by injunction from revoking the licence. For here the licensor, when he expressed his acquiescence, did not know that the land was his own. Having genuinely supposed that the matter was not his business at all, he could not be debarred on any equitable ground from later asserting his legal title when he discovered it. Thirdly, on the other hand, his acquiescence did deprive him of his right to damages for trespass up to the time when he protested. For this purpose his ignorance of his title was immaterial, for consent is always a defence to an action of trespass, regardless of the assumptions on which the consent is given. Until the licence was revoked, therefore, the company were in the right; thereafter, they were in the wrong. The award of damages could relate only to the latter period, diminished only by whatever interval was reasonably necessary for the company to make other arrangements after learning of the revocation.

The difficulty in understanding the case as reported is partly caused by the fact that the last of these points is considered before the first. The court enters into the question whether a vested easement can be extinguished by an oral licence before coming later to the conclusion that no such easement could exist in this case. It is also puzzling to find two apparently conflicting general propositions, which appear in the headnote as follows: "a proprietor of land was not debarred from asserting his legal right against one who was shown to have infringed it on the ground of acquiescence, unless it was clear that at the time he acquiesced he was aware of his proprietary right . . . ;" and "if A gives authority to B for the doing of an act on his land, and the act is done and completed, then whatever be the description of the authority, it is generally too late for A to complain. . . ." These opposing generalities can be reconciled only by adding that the first is evidently a rule of equity and the second a rule of law. Moreover, they must be applied to the facts of the present case at different stages, which again the headnote does not specify. Logically and chronologically the second of the rules must be applied first, and may be explained as meaning merely that leave and licence is always a defence to an action of trespass. Accordingly, A could not sue *before* he had revoked his oral consent, despite his ignorance of his own title. The second rule then comes into play for the period *after* the

revocation: equity would not therefore protect the company, although they had been encouraged to invest money in works on A's land, because A's ignorance of his title was for that purpose a very material fact; for as Fry J. said in *Willmott* v. *Barber* (1880) 15 Ch.D. 96, " the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights." The order in which these points were taken was to some extent due to the appeal and cross-appeal, which the Court of Appeal considered separately. But the decision could, perhaps, have been presented more clearly.

H. W. R. Wade.

CRIMES OF VIOLENCE

An Address * to the Cambridge Law Society

by

The Hon. Mr. Justice Salmon

I think that we all recognise that the enormous growth in crimes of violence is one of the most disturbing social phenomena of our time. In 1948 there were just over 5,000 such crimes committed in this country. In 1958 there were more than 12,000 such crimes and I understand that the figures are keeping up well in the current year. That means there has been an increase of over 100 per cent. on the 1948 figures. I would observe that in 1938 there were well under 3,000 such crimes; so there is an increase of over 400 per cent. on that figure. How—and this is a very pressing problem—how are we going to control and contract this wave of crime that threatens to engulf us and threatens the life and limb of so many ordinary, decent, law-abiding citizens?

There is a school of thought that considers that the reintroduction of corporal punishment is the answer. As you know, corporal punishment was abolished by the Criminal Justice Act of 1948 on the recommendation made by the Cadogan Committee in 1938. It is said that, if we can reintroduce corporal punishment, that will play a large part in overcoming this wave of crimes of violence. There is undoubtedly a very considerable popular clamour in favour of reintroducing corporal punishment. Now, that clamour is, I think, caused by an instinct for revenge. It is not surprising at all that our passion for revenge should be aroused. It is that passion that begot the principle of "an eye for an eye" and "a tooth for a tooth," a principle which we are supposed long since to have outgrown and discarded. The instinct for revenge, understandable as it is, is an uncertain guide and a dangerous master, and is likely to lead us backwards into dark and devious paths. I hope that we may have the courage to resist it. We have to decide this question with our minds, not with our feelings. But it is not only a popular clamour which is in favour of the reintroduction of corporal punishment; there are a number of most distinguished, learned, experienced and wise men who are in favour of this measure.

* Delivered on Friday, November 27, 1959.

The two main objects of all punishment are (a) to reform the criminal, and (b) to deter criminals and potential criminals from crime. I do not suppose that anyone would disagree with that. The order of priority does not always command the same unanimity of view. There is one other object of punishment which I have always found a little difficult to understand. It is said that it marks the abhorrence of the community for crime, and shows how fitting it is that a man who has erred should be punished. That, no doubt, is true, but if one exaggerates that element, one does get very close to saying that punishment should satisfy people's instinct for revenge. I prefer to think of the objects of punishment as being the protection of society and the reform of the criminal.

Let us consider for a moment to what extent flogging is likely to reform the criminal. In my view, it is exceedingly unlikely that it will do anything of the kind. In 1951 there was a Home Office inquiry into this subject and they considered very carefully all the cases of people who had been flogged for twenty or thirty years, I think it was, prior to 1948. The evidence showed that the records of the men who had been flogged were markedly worse after the flogging than they had been before it. So that does not seem to show, does it, that flogging has any curative effect. It may indeed embitter the individual or it may have no effect on him one way or the other. But it does not seem, on the evidence, that we can say that it is likely to reform him, because the evidence shows the contrary. So much for that.

What about flogging in relation to the other object of punishment, which, as I said, is to protect society and to deter the potential criminal? In my view, and it is a matter upon which different people of course have different views, but in my view it is equally unsuccessful in that sphere. Crimes of violence include a vast number of crimes: murder, rape, felonious wounding, and so on, and robbery with violence. Now, before 1948, in practice flogging was imposed only in cases of robbery with violence. (The odd thing is, that after flogging was abolished, if you look at the only category of crime for which it was formerly applied, namely, robbery with violence, the figures actually fell,) although crimes of violence in general increased. The figures for robbery with violence remained below the 1948 level for each year after 1948 until last year when they greatly exceeded the 1948 level. But no one can suggest that that rise in crime in 1958 can be attributable to a measure that was taken ten years previously, more particularly when, in each of the intervening years, robberies with violence were less in number than they had been in the last year when flogging was imposed.

That convinces me at any rate, that all this talk about "let us deter these thugs by flogging them" has very little foundation in fact. I suppose that if you were prepared to reintroduce the cat o'nine tails and double the doses that were previously administered, that would have a deterrent effect. The cat o'nine tails, as you probably know, is a contrivance consisting of nine strands of knotted raw hide which has the most shocking effect upon those to whom it is administered and—I am inclined to think—on those who administer it. Of course, if we were prepared to substitute the knout, which was used in Russia and is something very like the cat o'nine tails except that it has hooks attached to the thongs so the man's flesh is dragged off with every stroke, that might be a deterrent. But there is not so far as I know anyone anywhere who is prepared to advocate that, or who is prepared to advocate a return to the cat o'nine tails.

In considering these matters, you have to think of the whole picture. Deterrence is important and primarily important, but we have to consider it as civilised human beings. We must preserve a balance as civilised human beings. And no one in this country, except a very few Colonel Blimps, no thinking person in this country has advocated a return to the "cat." What is suggested is the birch. Now, I suggest that, when you have a case of a man who breaks into a house, knocks an old woman senseless with an iron bar and leaves her bleeding on the floor whilst he robs her of such savings as she has, or someone who jabs a broken bottle in another man's face, to give him six of the best is absurdly inadequate, indeed quite ludicrous. I do not believe it would be a deterrent. I think it is wholly inappropriate.

Well, you may say, what are we going to do about it, because we must do something? In this University, a Chair has been set up of Criminal Science, I think it is also called Criminology, and a great deal of research is going to be done into the cause of crime and a cure for crime. I have no doubt that this School will do extremely valuable work. The causes of crime, since the world began, have been, and I fancy will continue, until we reach Utopia, to be: greed, lust and cruelty. A great deal of research will be directed to discovering how it is that some people in certain conditions are more prone to these causes than others. It is a daunting task, because persons and the circumstances in which they live are infinitely variable. It seems to me to be plain that, taking the most optimistic view, the fruits of this research cannot have any practical effect for at least ten years and probably not for twenty or thirty years. That is not to say that the task is not worth

performing. It obviously is. But it is not going to bring forth anything practical now; and in the meantime the ordinary man and woman has to be protected. So we cannot for twenty or thirty years rely on what may be produced hereafter by the School of Criminal Science.

We shall conquer this problem neither by the easy course of flogging the brute, nor—at any rate for the moment—with the help of any researches that may be made in the School of Criminal Science. There are some ways, however, in which I think this problem can be and I hope will be solved. I want to mention one now, not because it is the most important, but because it is one to which I attach a great deal of importance, and it is one in which I think you can all help. One of the greatest factors in keeping young men straight are the boys' clubs which exist all over the country. They keep these boys off the streets and out of the public-houses and out of bad company. They conquer boredom, which is certainly one of the factors that makes for crime. They help to canalise and direct young men's sense of adventure into proper channels. They play an enormous part in helping the youth of this country. One of the chief difficulties of these clubs is that they cannot get enough voluntary workers. If there were more voluntary workers, we could have more such clubs and the clubs that do exist could expand. And I want to suggest to you that you could be doing some very rewarding work if one or two nights a week or a fortnight you were to go down and help in these clubs. You can do this in the vacation; and you will probably find that, during your first few years at the Bar or as a solicitor, your practice will not be so great that it will prevent you doing this night work also. Now, do think about that. I believe that this is a respect in which you can all help and you will find it very interesting, very good fun and, as I have said, very rewarding.

I believe that one of the other ways in which this problem can be solved is by imposing really severe sentences. If a man uses his freedom brutally to knock his fellow human beings about, he cannot in justice complain if he is deprived of that freedom. Nothing is more effective to stamp out a crime than a long term of imprisonment. That may sound harsh, but we have to remember the 12,000 or so ordinary people who last year were the victims of crimes of violence. They, and their like, must be protected. And in these circumstances it does not wring my withers at all to be told how awful it is that a comparatively young man should be shut up for a long time. If he has abused his liberty and committed a crime such as this, he deserves to lose his liberty and it is very much in

the interest of his potential future victims that he should do so. In the last century garrotting became very fashionable in Liverpool and Manchester; it went on for a very long time and caused enormous alarm. Mr. Justice Day went to the Manchester and Liverpool Assizes and he dealt with the garrotters by sending them all to prison, for ten years or something of that sort, anyway it was a very long term. But it was the end of garrotting in Manchester and Liverpool and virtually the end of garrotting everywhere else in the country. And there have been other such examples down to the present day. Short sentences are worse than useless. A man who is prepared to use brutal violence and is sent to prison for a few months considers it almost as a cachet when he comes out. He boasts about having gone to prison to his friends and a few months mean nothing to him. But people hate losing their liberty for any long time. There is the real deterrent. If it is generally known that he who commits a crime of violence will go away for many years, I think there is a real chance that we shall conquer this problem. And now, very heavy sentences are being given for crimes of violence. I think that policy will bear fruit.

I consider too, in this connection, that whenever a crime of violence which is of any importance at all comes before the magistrates, they should refuse to deal with it and send the case to quarter sessions or assize. Magistrates, as you will probably know, have jurisdiction to impose no more than six months in prison. They should refuse to deal with this type of crime notwithstanding that the prisoner wants to be dealt with summarily and notwithstanding that the police, who do not want to clutter up the quarter sessions or assizes, ask the bench to deal with it summarily. The bench should refuse. In my comparatively short experience, I have tried alas many, many such crimes all over England. I have been appalled, on looking into the records of many of these people, to find that they have previously been found guilty before a bench of magistrates of getting a man down and trying to kick in his face, or stick a bottle in his face or the like and then have merely been fined or sent to prison for a few months or even weeks. I have seen that many, many times. That is why I am so anxious that local benches should realise that if a man commits an offence of this sort he should be sent before a tribunal that has the power to deal with him adequately.

There is one other respect too—and it is perhaps the most important of all—in which this problem can be solved. 54.5 per cent. of the offences committed in this country last year were undetected. There was no arrest. That means that a criminal, as the mathematicians amongst you will realise, has just better than an even

chance of getting away with it. One of the best ways of preventing crime is that detection should be certain. At the moment the criminal has an even chance, or better than an even chance, of escaping detection. Our police are below strength. Some of their methods are certainly not as modern as they might be. It is of paramount importance that our police force should not only be brought up to strength, but substantially increased above its present strength. In order to achieve this we must make the terms of service attractive. Even after the recent increases in pay, the pay a policeman may expect to receive is not comparable with what he could reasonably expect in industry. Well now, the Treasury is notoriously mean, but this is stupidity. The money involved, looked at against a background of a Budget of over £4,000m., would be trifling, and it would be very well spent indeed. I am not saying a word against the police; they are a magnificent body of men on the whole doing their work extremely well. If we can, however, substantially increase their present strength and efficiency the odds against getting away with crime would go up from evens to ten to one against. The odds would then be so high that the criminal would not be prepared to take the risk.

I suggest therefore, that we (a) do what we can to keep these boys off the streets, interest them and direct them away from crime through boys' clubs; (b) increase the strength and efficiency of the police; and (c) send all the cases of crimes of real violence to be dealt with at quarter sessions or assize where the criminals will receive the punishment they so justly deserve. I believe that in this way we shall solve the problem.

NEW DEPARTURES IN MAINTAINING PUBLIC ORDER IN THE FACE OF CHARTIST DISTURBANCES

LEON RADZINOWICZ *

Avoidance of emergency legislation

"The people had a right to free discussion. It was free discussion which elicited truth. They had a right to meet." In these words at a civic reception in Liverpool on October 3, 1838, Lord John Russell proclaimed his belief in one of the basic freedoms of democracy, at the very time that Chartists were mobilising their forces and spreading their doctrine at meetings held throughout the country.[1] This was an untimely declaration which drew upon him the deserved reproof of Sir Robert Peel; it unfortunately seems to have been put later to some rather unscrupulous use by the Chartists, an example of which went to furnish Sir James Graham with offensive material for his attack on the Government during the debate of January 29, 1840, on a motion of no confidence. None the less, even when the Chartist gatherings had attained an advanced stage of organisation, Russell with undaunted singleness of purpose affirmed the Government's resolve not to ask Parliament for additional powers or extraordinary measures, but to rely on the existing laws: "It would be very inadvisable to make any sudden change in the laws of the country and to introduce laws, the same as in some foreign countries, of exception for certain parties; because those laws have two bad effects—the one is that they excite the sympathy of a number of persons who otherwise would have no feeling in common with ill disposed and designing persons; and in the next place, because the people of the country in general, and even those who appear to be the worst disposed, do feel that there is a power and supremacy in the law, to which they are ready to yield obedience; and if a new law were introduced merely for the suppression of those societies, they would not feel that they were treated with the same justice with which they would have been

* This article is based on a chapter of the forthcoming vol. 4 of my *History of the English Criminal Law, and its Administration*, to be published under the auspices of the Rockefeller Foundation.

1 *Life of Russell* (1889), by Spencer Walpole, vol. 1, p. 341; see also *Parl.Deb.* (1839) 3rd ser., vol. 45, cols. 108–110.

treated if the ordinary laws of the country had been resorted to for their suppression and punishment." [2]

Russell's attitude, from which he did not swerve throughout this period of social agitation, stands in striking contrast to that of Pitt and Sidmouth. His determination not to have recourse to emergency legislation went with a kindred unwillingness to apply certain drastic laws then available. Thus no use was made of the statutory powers for restricting freedom of association, authorised by 57 Geo. 3, c. 19, and 39 Geo. 3, c. 79. And although the Chartists were most careful to avoid any steps which might make them liable under these Acts, it was, as Hovell states, a tribute "both to the shrewdness of the Chartists in evading, and to the scruples of the Government in administering, bad laws that no prosecution under the Acts . . . was instituted during the Chartist agitation." [3] In June 1839 the restrictions of one of Sidmouth's Six Acts were actually relaxed.[4] The sanctions of the law of libel, too, were only invoked with restraint, although, by reason of the vagueness that perplexed the definition of seditious libel, the general criterion was easily broad enough to incriminate many Chartist proclamations and newspapers or periodicals [5]; but, in contrast with the times of Pitt and of Sidmouth, very few prosecutions were brought. In fact, freedom of discussion and freedom of the Press were even enlarged by Lord Campbell's Act of 1843.[6]

Another instance of the prevailing liberal disposition in the Government was the latitude allowed by the Commissioners of Stamps and Taxes in administering the stringent Stamp Duties Acts, which made it possible for many unstamped periodicals—some with strong radical leanings—to continue unchallenged. This apparent complaisance on the Government's part irritated that influential journal, the *Quarterly Review*; and in an article headed "Conduct of Ministers" it scathingly excused their timidity in allowing immoral and seditious views to be printed in certain newspapers, affecting to see in such a policy an "enlightened" tolerance of anything that might pass for "an axiom of political economy." [7] On the other hand, historical research has lately claimed to let in some not very flattering light upon the matter, and from the

[2] *Parl.Deb.* (1839) 3rd ser., vol. 49, col. 1157; *ibid.* vol. 47 (May 13, 1839), col. 1026; *ibid.* vol. 49, cols. 1153–1154 (Aug. 2, 1839).
[3] *The Chartist Movement* (reprint of 1943), by Mark Hovell, p. 198.
[4] By 2 & 3 Vict. c. 12.
[5] See J. R. Fisher and J. A. Strahan, *The Law of the Press, etc.* (1891), pp. 168–169.
[6] 6 & 7 Vict. c. 96.
[7] *Quarterly Review* (1839), vol. 65 (Dec. 1839), p. 283 at p. 297.

following extract there can be no doubt about the writer's charge against the ministry of a fairly profitable connivance at crime: "On each issue of *The Northern Star* the Treasury received about £250, exclusive of whatever smaller amounts the advertisement and paper duties might bring in. A clear £250 a week covers a multitude of sedition. On those terms what government would not be content to close its eyes?" [8] But such explanations do not go the whole way: obviously the Government took wise note of the dominant temper of public opinion and its policy was in some degree dictated by expedience, but it was also influenced by a genuinely broad-minded but circumspect outlook that had already commended itself in the 1820s; as another scholar has established, "from 1822 to 1829, there were hardly any prosecutions for libel, not because no libels were published, but because it was thought the wiser policy to let them alone." [9]

A strong justification of his own government's wisdom and forbearance is constructed by Fox Maule, Under-Secretary of State at the Home Office, upon a striking contrast with the parallel conduct of affairs in 1817; he was speaking during the debate on Sir John Yarde Buller's motion of censure which taxed the ministry with incompetence in handling the Chartist outbreaks and even accused them of complicity: "The Government of 1817 came down to the House for extraordinary powers. They came down to Parliament for the Six Acts. The 19th Chapter of the 57th Geo. III, under the pretence of being an Act for the more effectual prevention of seditious meetings, was in effect an Act passed for the purpose of suppressing public discussion altogether. Not content with these powers, they applied for the most extraordinary powers which that House could give to any Government—they applied for, and obtained, a suspension of the *Habeas Corpus*. . . . As far as I can form an opinion of the circumstances which gave rise to that course, I must say that I look upon it as having been a most unnecessary and extraordinary stretch of the powers of the Government. . . . Such is the parallel between the Governments of 1817, 1818 and 1819, and that of 1839." He gave also a cogent and politic reason for abstaining from a campaign of prosecutions: it precluded the "most undesirable spectacle of bringing numbers of state prisoners to trial, against whom, either from the weakness of the charges or from some other cause, no convictions were obtained." [10]

[8] *A History of the Chartist Movement* (1920), by J. West, p. 148.
[9] *Politics and the Press, 1780–1850* (1949), by A. Aspinall, p. 384.
[10] *Parl.Deb.* (1840) 3rd ser., vol. 51, cols. 854, 855–856.

Lord John Russell's circular letters

An early measure adopted by the Government to curb the Chartists' subversive activities was an indirect one aimed at putting an end to the illegal traffic in arms that had come to the notice of the authorities. Circular letters sent on March 23 and 25, 1839, were addressed to the Lords Lieutenant and magistrates of several counties, reminding them that persons combining to procure arms, or to induce others to buy arms, for the purpose of resisting the law were committing a misdemeanour; and that furthermore it was an offence under the Training Act [11] for a person secretly to train or drill others in the use of arms; the magistrates were enjoined to take prompt steps to prevent the recurrence of such offences and to arrest the offenders.[12]

Yet, as Lord John Russell acknowledged in Parliament, at the end of April it was all too clear that the "arming in parts of the country, and especially in Lancashire," was continuing.[13] A few days later, on May 3, a royal proclamation commanded that magistrates should, with the utmost dispatch, enforce the law against secret training and drilling and the unauthorised exercise of military movements, as well as suppress "unlawful meetings of large numbers of persons, some of them being armed with offensive weapons." The urgency of the proclamation was driven home with another issue of circular letters: the magistrates were ordered to seize any arms which they had reason to believe were being collected for seditious purposes; and in the event of a riot they were empowered to sign warrants of search for arms "in the possession of any persons proved to have used offensive weapons in the riot, or to have appeared armed among the rioters, or to have been employed in training or drilling." [14]

When these insistent but perfunctorily worded reminders from distant Whitehall stimulated so little effective action, instructions were sent to the Lords Lieutenant, magistrates and the mayors of boroughs to encourage the formation of "associations for the protection of life and property"—in spite of some previous trouble met with from these voluntary bodies through their interference with

[11] 60 Geo. 3, c. 1 (1819).

[12] See "Copy of Letter from the Secretary of State for the Home Department to Lords-Lieutenant of certain Counties, respecting Arming and Training" (179) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, p. 1. The letter was sent to the Lords Lieutenant of Monmouth, Staffordshire, Cumberland, Westmorland, Wiltshire, Northumberland, Somerset and Lancashire.

[13] *Parl.Deb.* (1839) 3rd ser., vol. 47, "The Chartists," col. 682. He was contradicted by Thomas Attwood, who "did not believe there had been fifty muskets or fifty pikes bought in England": *ibid.* col. 1027.

[14] See "Copy of Lord John Russell's Letter to the Magistrates etc." (299) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, pp. 1–3.

the enrolment of special constables.[15] The Government undertook to provide the necessary arms, should the principal inhabitants of any disturbed district wish to form such a protective corps.[16] Later in the same year, the number of associations formed in response to this call for aid in maintaining law and order was the subject of a report to the Home Office[17]: they were disappointingly few, reflecting perhaps the indeterminate temper of the chief authorities themselves, whereby on several occasions, it seems, applications for arms from groups of people wishing to form associations had been refused. According to the Duke of Beaufort, there were good reasons for arguing that "nothing could be worse than for bodies of men to enrol, and to arm themselves in this manner, without being placed under any regular military control."[18] This view, expressed by him in the House of Lords, was shared by the Duke of Wellington, who considered the arming of civilians as advised in Lord John Russell's circular, "a proceeding of a very peculiar nature, for which nobody at all would be responsible." Defending the circular, however, Lord Melbourne said that on the contrary the responsibility for the associations lay with the Lords Lieutenant. But he too was diffident about the outcome, and hoped that "it would not be necessary to act on [the circular] to a greater extent than it had already been acted on, and that it would not be drawn into precedent beyond the immediate occasion."[19] The Home Office itself was clearly undesirous of transforming such associations into semi-military bodies,[20] on the grounds both of legality and of the danger of placing offensive weapons in the hands of large assemblies over whom it was difficult to exercise strict control.[21]

The vagueness of the instructions contained in the Home Office circulars, perhaps symptomatic of the state of indefiniteness in the Government counsels, may doubtless be blamed for the baffled response of the local officials. On May 29, 1839, Colonel Rolleston bluntly asked Lord John Russell on behalf of the Nottingham magistrates for clearer guidance[22]: he wished to be informed as to

[15] *Ibid.*

[16] See "Copies of Letters of Lord John Russell to the Lord Lieutenants of certain Counties, suggesting the formation of Associations etc." (299) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, p. 3.

[17] Presented by S. M. Phillipps, an Assistant Under-Secretary of State, Home Office; see (559) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, p. 13.

[18] *Parl.Deb.* (1839) 3rd ser., vol. 48, June 11, "Arming the People," col. 134 at col. 135.

[19] *Ibid.*

[20] See Home Office to Dundas, May 28, 1839, H.O. 41/14.

[21] See Home Office to the Mayor of Bolton, May 21, 1839, H.O. 41/14; ditto to the Mayor of Macclesfield, Nov. 26, 1839, H.O. 41/15; Potter to the Home Office, July 18, 1839, H.O. 40/43; Mayor of Leeds to the Home Office, July 25, 1839, H.O. 40/51, and July 26, 1839, H.O. 40/51.

[22] See "Copy of a Letter addressed by Colonel Rolleston, M.P., to the Secretary of State for the Home Department, etc." (464) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, pp. 9–11.

what circumstances, and in particular whether the carrying of arms by some of the persons attending a large meeting, would give "a character of illegality to the meeting generally"; also, whether a meeting should be declared illegal if it were not attended by any armed persons but if, "from the terms of the notice calling the meeting, and from the numbers attending, summoned, or likely to attend, or actually attending," it were calculated to create apprehension. He did not seem to be in favour of a too rigid definition, for "large meetings of persons convened for a purpose not in itself illegal and assembling probably without the premeditation of violence," might suddenly, "through confidence in their physical strength," be induced to commit excesses destructive of private property and dangerous to the public peace[23]; in support of this notion he went on to quote Lord Plunkett's statement in the House of Commons in November 1819, that, "from the earliest period of our jurisprudence, . . . any assembly of the people held under such circumstances as to create in the minds of the King's peaceable subjects reasonable grounds of alarm, in respect to the security of their persons and properties, were illegal assemblies, and liable to be dispersed as such."

Lord John Russell's answer was not quite consistent with his Liverpool speech, in which he had unreservedly defended the right of people to meet: "as, undoubtedly, meetings may be unlawful though no person present should be armed; so, on the other hand, the presence of *some persons* armed might not be of itself, and singly, enough to make the *general meeting* unlawful, if in other respects the meeting were lawful; for it is possible the attendance of such persons might be entirely unconnected with the general purposes and objects of the meeting."[24] He strengthened his statements with judicial opinions given in leading cases, citing Parke J. in his charge to the grand jury of Wiltshire on January 1, 1831,[25] and Coleridge J. in his charge to the jury at Devizes in 1839; he also quoted the definition of a riotous assembly given by Bosanquet for the Special Commission of 1831. And in a speech in the House of Commons he expatiated further, and set out several circumstances which might render a meeting unlawful, adding that, whereas the elements of terror and alarm might be present in a situation without a blow being struck or threatened, it was a great mistake to suppose, "when there is no actual riot and breach of the peace, no actual danger to persons and property, . . . such meetings

[23] *Ibid.* p. 10.
[24] See "Copy of a Letter from Her Majesty's Principal Secretary of State for the Home Department to Colonel Rolleston, etc." (448) *Parl.Pap.* (1839), Acc. and Pap., vol. 38, p. 7.
[25] 2 St.Tr.(N.S.), App.G, p. 1025 at p. 1028.

can be considered lawful"; in which point he was contradicted by Lord Brougham, who also said that numbers were no test of illegality.[26]

In fact Lord John Russell's early administration was in keeping with his very proper assumption that the citizens were at liberty to demonstrate and express their grievances so long as they refrained from wantonly transgressing the laws, and with his tactical expectance that they would observe these bounds; but, as he prudently saw, they needed to be reminded or made to understand that there was only a narrow margin left now between their extremists' activities and sheer criminal methods of gaining their ends. Pressure of events was going to force him to change an attitude of passive vigilance for a deliberate intervention in the name of the Queen's peace. However, in September 1838 he had vetoed any interference with a meeting called by the Chartists on Kensal Moor, although its great publicity and the extent of its preparations had caused much apprehension.[27] And, whereas the formidable torchlight meetings of that autumn were watched by the Home Office with anxiety, a royal proclamation was as yet considered a sufficiently suppressive gesture. "For a short period," writes Gammage, "the factory districts presented a series of such imposing popular demonstrations as were perhaps never witnessed in any previous agitation"[28]: on November 14, 1838, several thousand persons had walked in procession to attend a torchlight meeting at Hyde, and in December a similar meeting had been held near Bury, in defiance of a notice proclaiming its illegality[29]; on December 14 yet another proclamation resounded warnings against flouting the law; then on December 22 the magistrates at Framlingham were being cautioned by the Home Office that "the mere holding of a meeting by torchlight or candle light does not render it illegal."[30] The *Spectator's* leading article could not have been more fairly outspoken: "The interference of the Government is requested to prevent illegal meetings of large bodies of working men."[31] But, since there was as yet no specially trained civil arm of the law to control people converging upon an appointed place in their thousands, once assembled they were in command of the situation until the military were brought up to use

[26] *Parl.Deb.* (1839), 3rd ser., vol. 50 (Aug. 29), col. 483 at col. 484 (Chartist Prisoners).
[27] See Wemyss to the Home Office, Sept. 24, 1838, H.O. 40/38.
[28] R. G. Gammage, *History of the Chartist Movement* (1894), p. 94.
[29] See the *Spectator* (1838), no. 546, p. 1173. See also Macoby, *English Radicalism, 1832–1852* (1935), note 3 at p. 182 for an account of a meeting at Bolton on Oct. 29, 1838.
[30] Home Office to Moseley, Dec. 22, 1838, H.O. 41/13.
[31] *Spectator* (1838), no. 546, p. 1173; see also *ibid.* (1838), p. 1155.

force for their dispersal.[32] The Government's policy of self-restraint was certainly carried almost to the point of self-effacement.

A change in the means of securing confidential information

The close watch that the Government had to keep on the moves of the Chartists made it necessary for them to know something of the purposes beforehand in order to anticipate any serious threat to the civil authority: they might thus keep the situation in hand without relinquishing their defensive policy of tolerant vigilance which enabled them to maintain the reality of control. There has never been in this country any organised system of political espionage such as in France once so heavily oppressed the individual in his private life. However, for the sake of countering hidden and seditious activities, governments have had to tap channels of secret information; but on this point again Lord John Russell's attitude showed a sharp contrast to his predecessors. "It is well known," he said in Parliament, "that not many years ago, when Lord Sidmouth held office, he thought it was a fair and legitimate means of preserving the peace, to employ the instrumentality of spies. I consider that spies are not only objectionable, but dangerous to the spirit of this free country. . . . I have always taken a view of the subject which induces me to think that spies ought not to be employed even in the most dangerous state of the country; and . . . I believe . . . that the employment of spies does not at present exist. . . ."[33] But at the same time he considered that there was no need for a law explicitly prohibiting the employment of professional spies or even for a declaration by the House of Commons.

The line between a spy and a confidential agent or paid informer is a fine one: sometimes the immediate distinction only lies in the character of the man himself. And, whereas the employment of paid informers was not discouraged, the agents through whom the Home Office obtained covert facts were principally the local justices, an obvious source of information on the affairs of their neighbourhood: as a typical instance of this practice, the Home Office Papers in the early part of 1840 show the magistrates of Huddersfield hiring the services of two agents for supplying them with reports about the numbers and movements of the Chartists, their secret meetings,

[32] See the Attorney-General's comments upon the processions (mentioned above) which converged upon the appointed meeting place at Hyde on Nov. 14, 1838, in *R.* v. *Stephens* (1839), State Trials (1831–40), N.S., vol. 3, p. 1190 at pp. 1192–1193; see also the *Spectator* (1838), no. 546, p. 1173; and "Torch-light meetings and their consequences," in the *Manchester Guardian*, Dec. 12. 1838.

[33] *Parl.Deb.* (1845) 3rd ser., vol. 77, col. 987.

whether an oath was administered to those attending, whether the speeches were "of a treasonable nature," and whether the participants were armed.[34] But much caution and restraint was exercised in the pursuit of confidential information; and, on a number of occasions, before deciding whether to contribute to the payment of an informer employed by a local authority, the Home Office, with the help of the Commissioners of the Metropolitan Police, subjected the case to a close scrutiny.[35] Unfortunately it also happened that information had to be accepted sometimes from professional agents of questionable reputation.[36]

The recently instituted inspectorate of mills and factories—where, among the workers, so many Chartist associations found strong support—seems to have offered the Government unique facilities for discovering the very information that it most wanted.[37] It had not been long either before the prospect of a sinister hand-in-glove relationship between the inspectors and those to whom they were responsible became conspicuous to the factory workers and soured their feelings toward their new "protectors": "the factory population was no less angry or suspicious than its leaders."[38] The opportunities that were rife for the abuse of powers could not escape their minds; "if these inspectors," said the Reverend G. S. Bull, a leader in the movement for factory legislation, "in whose appointment the mill-owners will have due influence, should take the sides of their patrons and masters, so extensive, so arbitrary are their powers, that we shall want nothing but the torture room to complete their character and office as factory inquisitors."[39] And in a report of a Select Committee of 1840 that had been examining the working of a factory Act is found conclusive evidence that the Home Office did not resist the temptation to gain so easily an intimate knowledge of the local plans of Chartist trouble-makers; the reply of James Stewart, the

[34] See letter from Battye, Brook and Walker to the Home Office, Jan. 22, 1840, H.O. 40/57.

[35] See the Home Office's very interesting letter to Lord Newcastle, Dec. 21, 1838 (private), H.O. 41/13. See also Fowler's two letters to Lord John Russell, Jan. 16, 1839, and Feb. 22, 1839, H.O. 44/52, and the reports of Inspectors Hughes and Pearce dated Jan. 19 and 22, 1839, H.O. 44/52.

[36] See, for instance, the letters of Paley, Thompson and Hird, magistrates, to the Home Office, Dec. 17, 1839, H.O. 40/51; and of the Bradford magistrates, ditto, Jan. 27, 1840, H.O. 40/57.

[37] The factory inspectorate was instituted on the recommendation of the Commission inquiring into the employment of children in factories; see their "First Report etc." (450) *Parl.Pap.* (1833), vol. 20, pp. 1–74. The Commission's recommendations were embodied in the Factory Act of 1833 (3 & 4 Will. 4, c. 103).

[38] *Lord Shaftesbury*, by J. L. and B. Hammond (4th ed., 1936), p. 36; and *The Times*, May 22 and June 10, 1833.

[39] Quoted by B. L. Hutchins and A. Harrison, *A History of Factory Legislation* (2nd ed., 1911), p. 56.

factory inspector, given in the course of his interrogation by the committee, is loyally evasive but could not have been more illuminating: "I have never employed Mr. Beal [a superintendent] but as a superintendent of factories, except confidentially, in consequence of instructions from the Secretary of State; and these instructions were of so confidential a nature that unless I am authorised by the Secretary of State, I decline answering the question." It then transpired that Stewart was from time to time required by the Secretary of State to provide information on the temper of political feelings in industrial districts.[40] While he admitted to sending letters to various superintendents asking them to report at intervals "the proceedings of the working people with regard to political meetings in their districts," he emphatically denied having employed them as "spies." The committee finally passed a resolution that "the employment of the inspectors and superintendents of mills and factories in the discharge of duties under confidential instructions . . . ought to be brought before the House of Commons as a distinct question."[41]

The resolution was duly acted upon by John Fielden, who was a member of the Select Committee, at a sitting of the House on July 17 of that year. He caused much embarrassment to the Government by reading a letter from Stewart to Beal which made it clear beyond any doubt that inspectors of factories were being asked to perform duties other than those for which they had been appointed and that these extraneous duties were invidiously political.[42] But his motion to set up a committee of inquiry met with overwhelming defeat by 113 votes to 11, Disraeli being among the eleven. Sir John Hobhouse (afterwards Lord Broughton), who was then President of the Board of Control, thus records this debate: "July 17, 1840. We had a long debate on Mr. Fielden's motion on Political Spies. Peel took care to remind us that, in former days, we condemned the use of spies. Russell answered him in an excellent speech and showed the difference between employing such men as Castles, Oliver, and Edwards, and desiring public functionaries to report on the state of the country. Sir James Graham had got a volume of Hansard, and looked at me and smiled. I suppose he was reading my speech in 1820, against spies—the first I ever made in Parliament."[43]

[40] "Fifth Report from the Sel.Com. on the Act for the Regulation of Mills and Factories, . . ." (419) *Parl.Pap.* (1840), vol. 10, p. 507, evidence no. 8205 at pp. 635 and 635–638. See also *ibid.* nos. 8276–8277 at p. 640.

[41] *Ibid.* p. 641.

[42] See *Parl.Deb.* (1840), 3rd ser., vol. 55 (July 17), "Factory Inspector-Spies," cols. 785 and 788.

[43] *Recollections of a Long Life* (ed. by Lady Dorchester, 1911), vol. 5, p. 281.

Both Sir Robert Peel and the Home Secretary, Lord John Russell, naturally defended the practice. Peel was emphatic about the importance of obtaining accurate information, particularly in times of excitement and discontent; besides, as he pointed out, the instructions did not require inspectors " to mix amongst the people, or to stimulate them to engage in illegal proceedings for the purpose of getting information to be afterwards used by the Government " [44]; he would even go so far as to contend that, in certain circumstances, the Government might be justified in making use of information provided by " a party to the conspiracy " and in encouraging the informant to maintain his connections with the conspirators.[45] The Home Secretary dwelt upon the difference between requesting a government official to report on the state of the country and especially upon such developments as had a cardinal bearing upon public order, and hiring persons " in a low station of life " to eavesdrop or paying them to betray the confidence of fellow club members: the one was a confidential state agent, the other was a common spy. On a view that in acting as they did the Home Office was anxious to avoid the only other alternative of employing casual informants paid by piece who were so prone to turn *agents provocateurs*, the adoption of this regrettable measure can to some extent be explained.

The Metropolitan Police service was already proving itself an efficient body for the prevention of crime; and any recourse to underhand means for the forestalling of sedition was strongly discouraged among them: in 1839 an order was issued to police superintendents prohibiting constables from attending private meetings [46]; and a characteristic episode which happened at a Chartist gathering has been noted in a recent work on British police, when some policemen in plain clothes being asked by the party secretary for their names and addresses left the room and returned wearing uniform.[47] But there is evidence in Home Office correspondence that in the provinces the practice was not so scrupulous: in Birmingham constables in plain clothes insinuated themselves into Chartist branches and clubs, and even took part in their military exercises [48]; in Manchester parts of a similar nature were

[44] *Parl.Deb.* (1840), 3rd ser., vol. 55 (July 17), col. 801.
[45] *Ibid.* col. 805. As an illustration he quoted the Thistlewood conspiracy.
[46] See *Police Order Book*, Aug. 10, 1839; preserved in Metropolitan Police Records, New Scotland Yard.
[47] *British Police and the Democratic Ideal* (1943), by Charles Reith, pp. 248–249.
[48] Report of Wilson, Dec. 1, 1839, H.O. 40/50; letter of Burgess (Head of the Birmingham Police) to the Home Office, Jan. 14, 1840, H.O. 65/10; report of John Pashley (a constable: P.C. 276), H.O. 40/56.

played by spies in police pay, but considerable caution was used respecting the information which they supplied.[49]

The gravity of the situation must have appeared extreme, and the means of coping with its hidden dangers desperately defective, for the Home Secretary to have taken the unusual step of authorising the opening of private letters. However, in February 1839, the Postmaster-General was authorised under a warrant " to detain, open and send for my [Russell's] inspection all letters " addressed to Dr. Wade, Mr. Richardson, Mr. Vincent and Mr. Hartwell.[50] Later the same year similar warrants were issued in respect to letters addressed to a number of other Chartists, including Hetherington, Feargus O'Connor, Lowery, Fletcher, O'Brien, Carpenter and John Frost.[51] The letters were not confiscated but only intercepted; they were opened, copied and then forwarded to the addressee. No official indication was given that they had been opened: in fact, after inspection the letters were punctually resealed so as to cover all traces of the interference; great care was also taken to avoid delay.[52] For several years the practice eluded notoriety, until at length it became the object of acute controversy in 1844, when its propriety and legality were questioned.

But, if the methods used at the time for collecting confidential information are impartially scrutinised, there can be no doubt that a considerable change for the better had taken place. All gross abuses once so rampant were avoided; and objectionable as some of the practices may still have been, a greater discrimination and restraint were displayed throughout the whole period. " In former days men were actually employed by the government to provoke the people against order and the laws, that an argument might thence be derived in favour of absolute power." [53] With this rather left-handed compliment a contemporary radical pamphleteer

[49] Shaw to the Home Office, Dec. 18, 1839 (private and confidential), H.O. 40/43; Dec. 20, 1840 (confidential), H.O. 40/54; Jan. 3, 1840, H.O. 40/54; Feb. 12, 1840, H.O. 40/54.

[50] See warrant to the Postmaster-General, Feb. 8, 1839, H.O. 79/4. For a collection of such letters, see H.O. 40/53.

[51] See warrants to Postmaster-General, May 9, 1839, H.O. 79/4; May 23, 1839, *ibid.*; Aug. 1, 1839, H.O. 79/4; Aug. 2, 1839 (secret), *ibid.*; Aug. 5, 1839, *ibid.*; and Dec. 21, 1839, H.O. 79/4 (relating to Cards, Harvey, Reddic, Hansom, Dr. John Taylor and Arthur).

[52] See the letter of Maberley, Secretary to the Post Office, to Fox Maule, Assistant Under-Secretary of State at the Home Office, Feb. 15, 1839, H.O. 40/53; and see the two letters of the Home Office to Maberley, Aug. 5, 1839 (secret), H.O. 79/4. For some interesting details see Maberley's letter to the Home Office, Nov. 20, 1839, H.O. 33/4; and the letter of the Home Office to Maberley, Dec. 27 and 28, 1839, H.O. 79/4.

[53] Rev. B. Parsons, *The Shaking of the Nations and the Downfall of Tyranny*, included in a letter of Neale to the Home Office, June 17, 1848 (strictly private and confidential), H.O. 40/59.

acknowledged the improvement that had taken place in the ethics of administration.

Strict adherence to the rules of law; and leniency of punishment

Russell's circular letters and the royal proclamations did little more than keep up an alertness among the civil authorities to which they were addressed, the instructions themselves being virtually futile, since it was impossible to carry them out with any degree of facility, equity or speed. Prosecutions for the numerous offences committed were gravely hampered as well by the vengeful pressure exerted upon witnesses for the prosecution as by the intricacies and delays of legal procedure; in fact, the special difficulties encountered at this period in conducting trials and obtaining convictions for sedition led in 1848 to some much needed changes in the law. At the very outset the preliminary steps in collecting evidence of illegal conduct were sometimes the most difficult: strict rules made the testimony of reporters on the speeches to which they had listened at Chartist meetings inadmissible, except in corroboration of evidence otherwise obtained. Though the authorities often employed shorthand writers—one even attended the Chartist Convention of 1839, and nearly all the speeches at Chartist meetings in Lancashire and Yorkshire were recorded by such agents [54]—once their business was recognised, the stewards used particular vigilance for thwarting any attempts to take down notes. Moreover, even if successful, it was an expensive arrangement costing sometimes £40 for a night's work, to which the Home Office could not always be relied on to contribute.[55]

The state of apprehension that gripped some parts of the country and kept residents silent and loth to come forward in support of justice is eloquently conveyed by the simple statement of one Mr. Joshua Pickford, which has been preserved in the Home Office papers; it sets forth the grounds on which he appealed to the Home Secretary for relief from his obligation under subpoena [56]:

> "I have, along with others, been summoned and subpoenaed to give evidence, at the Chester Assizes, against Joseph Rayner Stephens; in consequence of which, both my life and property,

[54] See H.O. 40/44 and H.O. 44/52; Templeton's letter of Apr. 24, 1839, H.O. 40/43.

[55] See letter to the Home Office, Apr. 24, 1839, H.O. 40/43; and letter to Laycock, Sept. 5, 1839, H.O. 41/15.

[56] *R.* v. *Joseph Rayner Stephens*, 3 St.Tr.(N.S.) note (a) at p. 1199. See further the letter of Maude (a Manchester magistrate) to the Home Office, Apr. 25, 1839, H.O. 40/43; of the Clerks of Magistrates, Ashton-under-Lyme, ditto, May 1839, H.O. 40/37; of Templeton, ditto, Apr. 24, 1839, H.O. 40/43; of the Mayor of Manchester, ditto, July 25, 1839, H.O. 40/43; and the letter of Charlton and Hibbert, ditto, June 29, 1839, H.O. 40/37.

> and the property of my esteemed partner, have been, and are still, in danger of being destroyed by the Chartists and their credulous adherents. . . . We have a population of upwards of 12,000 persons in the townships of Hyde, Newton and Godley, all of which are contiguous to each other; nine tenths of whose working population are Stephenites or Chartists, the whole of which are armed; a great many of whom are very desperate characters. We have one constable under the Cheshire Constabulary Act, three or four leet constables, and from 300 to 400 special constables. We have no soldiers nearer than Manchester. . . . The above facts, along with many more that might be stated, have induced me to request that your Lordship will not call upon me to give any more evidence against Joseph Rayner Stephens."

Thus, added to the preliminary and procedural difficulties of obtaining evidence against the agitators, it seems that fear of consequences constituted a deplorable impediment to the calling of witnesses, whether ordinary citizens or persons engaged in the administration of the law. But these were not the only advantages favouring the Chartists: on other grounds the law officers in a number of cases had to advise Lord John Russell not to attempt prosecutions.[57] Indeed, the Resolution agreed by the General Convention in July 1839, and posted throughout the country, was cited by Lord Melbourne in Parliament to exemplify how the protection afforded by the customary strictness of all legal proceedings might redound to the benefit of the unprincipled; he said that the resolution was "very artfully worded" and could not be contradicted; "with the legal powers which exist in this country—with the privilege of free speech and free discussion which exists—in order to be extremely inflammatory and exciting, it is by no means necessary to break the law. On the contrary, it is not so entirely the breach and the violation of the law which is to be dreaded, as the abuse of the law and the pushing to the utmost of those powers and privileges which the people legally possess."[58]

It appears also that the local authorities found it a hazardous business carrying out Lord John's instructions for the seizure of weapons that they had reason to believe were intended for the perpetration of acts of violence.[59] The duty was beset with pitfalls

[57] Lord John Russell, *Parl.Deb.* (1839), 3rd ser., vol. 49, col. 1155.

[58] *Parl.Deb.* (1839), 3rd ser., vol. 49 (Aug. 5), "Public Discontent," col. 1200 at cols. 1202–1203.

[59] See a letter of the Home Office to the Mayor of Newport, Nov. 20, 1839, H.O. 41/15; a letter of Dudley to the Home Office, July 25, 1839, H.O. 40/44; and a letter of the Home Office to Dudley, July 27, 1839, H.O. 41/14.

for the over-zealous and the Chartists were quick to take advantage of any false step made in the process. For instance, in Mansfield an action was successfully brought against the magistrates for illegal search; and the unhappy magistrates were left to pay the costs of their failure because the Home Office could point to a defect in the search warrant which was entirely their fault: they had failed to state the illegal purpose for which the arms had been collected.[60] Since the sale of arms was only illegal if it could be proved that its object was to induce the purchaser to resist the law —a most difficult fact to establish—the magistrates often had to fall back on a charge of hawking without a licence.[61] Still greater caution had to be observed by those who, in the course of a raid upon clandestine meetings of Chartist leaders, were prepared to seize documents, since the justification for this step rested upon such elusive elements as might constitute evidence of a reasonable belief in a seditious plot.[62]

At another stage in proceedings the free practice of granting bail could lead to pernicious results, allowing, as it did, even the most notorious agitators to continue their activities—often for a considerable time—after it had been decided to charge them, and while preparations were afoot or assize dates were pending. According to an interesting White Paper, at least 95 per cent. of all Chartists arrested in the particular period 1839–40 were granted bail.[63] The outstanding case is that of the indomitable Chartist agitator, Joseph R. Stephens. Arrested on December 27, 1838, he was released on bail to appear before the magistrates on January 3, 1839; on appearance he was committed to stand his trial at the next assizes at Liverpool and was again granted bail. The assizes were not held until April 29, when two true bills were found against him for taking part in unlawful assemblies at Leigh and Pennington; but a delay was caused through the removal of the case by writ of certiorari to the Court of Queen's Bench. Here, on a plea of not guilty, and having made an application to be furnished with a copy of each indictment, Stephens was once more released on bail, at liberty to pursue his own purposes, until August 15, 1839, when his case was finally prosecuted at Chester.[64]

[60] See memorial of the Duke of Portland and of three magistrates, Nov. 7, 1840, H.O. 40/55.

[61] See the letters of the Home Office to C. H. Leigh, March 23, 1839, H.O. 41/13 and that of Leigh to the Home Office, July 1, 1840, H.O. 45/49.

[62] See the letter of the Home Office to Shaw (Commissioner of Police in Manchester), Aug. 14, 1839, H.O. 41/14 and the letter of Shaw to the Home Office, March 1, 1841, H.O. 45/46.

[63] *Prisoners for Libel* (1840); on this paper see below, n. 69.

[64] See G. J. Holyoake, *Life of J. R. Stephens* (1881), pp. 143–145, and *R.* v. *Stephens*, 3 St.Tr.(N.S.), p. 1190, note (c) at p. 1208 and note (a) at p. 1209.

There is evidence that some English magistrates were inclined to allow their concern for the preservation of the peace to carry them beyond the limits of their jurisdiction: the Staffordshire justices appear to have decided, after some debate among themselves, that in the then disturbed and fractious state of the neighbourhood persons committed for attending illegal meetings, for using seditious language and, particularly, for inciting outrages, should not be admitted to bail, even on producing sufficient sureties. (In taking this decision, apparently, they had the support of the Lord Lieutenant of Worcestershire and other officials responsible for the maintenance of order.) When two of their number were prosecuted for refusing bail offered by one O'Neill, who had been apprehended for seditious language, the judgment of Lord Denman upon them in the Queen's Bench made it quite clear that their behaviour, though prompted by no corrupt or personal motive—incited rather by an excess of zeal for the public cause—was a wilful defiance of the known law; and he explicitly stressed the singular danger, in such times of unrest, of persons in authority presuming to take the law into their own hands: "the assumption of powers not given by the law appears to us peculiarly ill judged at a period of political disturbance and . . . rendered so much the more culpable, if deliberately done by high functionaries having a judicial duty to perform." [65]

Just as no stricture of overbearing or vindictive dealing could be applied to the Government's countermoves in the face of Chartist lawlessness and seditious propaganda, even so the treatment accorded to convicted ringleaders and supporters was noticeably the same equitable justice as was meted out in general to non-political offenders. In fact the Crown's prerogative of intervention was time and again exercised in merciful commutation. This leniency of treatment has been sadly distorted by the author of an otherwise excellent monograph on the Chartist movement: he alleges that the arrested leaders "were subjected to a most humiliating treatment by prison authorities," and further speaks about "the wholesale arrests and the ruthless prosecution." [66] These superlative statements are not borne out by the evidence. If the petitions presented to Parliament on behalf of the prisoners complaining of ill usage are examined, a considerable number turn out to have concerned incidents of a paltry nature. Many complaints related to such minor discomforts as dirty cold baths and compulsory haircuts; as well as to some rather less bearable, such as

[65] *R.* v. *Badger and Cartwright* (1843) 4 Q.B. 468 at p. 474.
[66] F. F. Rosenblatt, *Social and Economic Aspects of the Chartist Movement* (New York, 1916), vol. 73 of the Columbia Univ. Studies in History, Economics and Public Law. pp. 205 and 206.

the close companionship of common felons, an insufficiency of food, and lack of attention during serious illness.[67] Where in some instances the treatment was undeniably harsh, it was not more so than that met with under the general prison conditions of the day; also—if that afforded any consolation—it was strongly condemned by unprejudiced writers owing no allegiance to the cause of the Chartists.[68] "We are Englishmen and, as Englishmen, we hate tyranny in every shape and under every disguise . . . [though] we have no sympathy, in politics, for anything that is not 'respectable.'"

Even less founded than the allegations regarding maltreatment of the imprisoned Chartists is the contention, freely repeated by most historians of the movement, that the arrests were indiscriminate and the prosecutions ruthless. A full account of all measures taken against the agitators, published by the Government at the request of Joseph Hume, testifies to the sound legality of all criminal proceedings and executive processes, fully maintained as it was even under the conditions of a serious upheaval and at a time when few other countries could claim fairness for the measures taken against ordinary criminals, let alone against political rebels.[69] As far as can be ascertained, the historians of the Chartist movement have often ignored this candid and vindicatory document.

[67] See petitions on behalf of Chartist prisoners presented by Lord Brougham and others in *Parl.Deb.* (1839), 3rd ser., vol. 49, July 8, col. 437; Aug. 2, col. 1188; vol. 50, Aug. 22, col. 483; (1840), vol. 51, Jan. 24, col. 508; vol. 54, May 27, cols. 647, 648; June 2, cols. 895, 908; vol. 55, July 3, col. 408; (1840), vol. 53, April 14, col. 1103; vol. 55, July 10, col. 618; July 17, col. 771; (1841), vol. 58, May 25, cols. 740, 745–749. Much detailed information is also given in a number of White Papers. See for instance "Copy of the proposed Rules respecting Prisoners in *York Castle*, etc." (422) *Parl.Pap.* (1840), Acc. and Pap., vol. 38, p. 613; "A Copy of Correspondence . . . respecting the Treatment of Mr. Feargus O'Connor, etc." (395) *ibid.* p. 615; "Return of the Rules, stating the Treatment, before and after Conviction, of Persons confined in Fisheton Gaol, (and) . . . the Gaols of Ilchester and Wilton, . . . from 1833 to the present Time" (426) *ibid.* p. 631; "Copies of any Memorials or Correspondence relating to the Treatment of William Lovett and John Collins, etc." (44) *ibid.* p. 751; and "Copy of the Rules and Regulations adopted in the County Gaol of Warwick" (455) *Parl.Pap.* (1839), Acc. and Pap., vol. 38 p. 459; "Prisoners for Libel etc." (600) *Parl.Pap.* (1840), Acc. and Pap., vol. 38, p. 691.

[68] "Chartism" in *Fraser's Magazine*, Jan.–June 1848, vol. 37, p. 579, at pp. 585–586.

[69] See "Prisoners for Libel" (600) *Parl.Pap.* (1840), Acc. and Pap., vol. 38, p. 691. The full title of the paper runs to more than 300 words but it can be abbreviated to: "A Return from each Gaol and House of Correction in the United Kingdom from January 1, 1839 to June 1, 1840, stating: (1) The Name of every Person confined for Charges for Printing and Publishing Seditious or Blasphemous Libel, or for Attending any Seditious Meetings, or for any Offence of a Political Nature; the Nature of the Charge; the Term of Sentence suffered, (2) The Treatment before and after Conviction. . . . (4) Comparative Treatment of Persons Confined for Misdemeanour before and after Conviction or Sentence."

According to the *Return*, from January 1, 1839, to June 1, 1840, 480 persons were imprisoned for political offences,[70] of whom just over 400 were ultimately convicted.[71] Twenty-two prisoners were tried for high treason and sedition[72]: of the twelve sentenced to death nine had their sentence commuted to transportation for life and one to transportation for ten years.[73] But apart from these, only eight prisoners were sentenced to transportation, one in England and seven in Wales. Thus the overwhelming majority were sentenced to imprisonment or ordered to enter into recognisances and find sureties to keep the peace.[74] Again, among the prison sentences only one was for four years, six for three years, sixteen for two years and six for periods ranging from eighteen to fourteen months. There were thirty-two cases of imprisonment for twelve months and all the remaining sentences were for nine months or less. The trend is well illustrated by the figures in Fox Maule's speech during a debate in the House of Commons in 1840.[75] In that year, out of 290 persons brought to trial on charges of high treason, sedition, libel, conspiracy, riots and allied offences, 168—or more that half—were sentenced to imprisonment for six months or less, or were ordered to pay a fine. Another fifty-two were discharged. By May 1841 only thirty-nine Chartists had not yet been set at liberty.

[70] In the *Return*, the total is given as 380, which is evidently a misprint; *Parl. Pap.* (1840) Acc. and Pap., vol. 38, p. 693. The *Return* gives an aggregate figure for all persons confined to prisons only. It has therefore been found necessary to compile other aggregate figures on the basis of material scattered over some 33 pages of the *Return*. This was a laborious process and slight errors may have crept in. But they would not invalidate the general conclusions.

[71] According to Fox Maule, the Under-Secretary of State, "about 467 persons were tried for offences connected with chartism, and of that number 379 were convicted"; *Parl.Deb.* (1841), 3rd ser., vol. 58, col. 751. It is not clear, however, whether this figure includes persons convicted in Wales. According to W. J. Linton, 443 Chartists "were imprisoned for different periods in 1839 and 1840": *Memoirs* (1895), pp. 36–37.

[72] See 4 St.Tr.(N.S.), App. C, pp. 1407–1408.

[73] Fox Maule in Parliament; see *Parl.Deb.* (1841), 3rd ser., vol. 58, col. 752. They were: John Frost, William Jones, Zephariah Williams, Charles Walters, John Rees, John Lovett, Richard Benfield and Jenkin Morgan, all tried for high treason in connection with the rising at Newport; committed on Nov. 5 and tried on Dec. 31, 1839. Francis Roberts, John Jones and Jeremiah Howell, convicted in August 1839 for unlawfully assembling, and demolishing a house during a riot in Birmingham; sentenced to death under 7 & 8 Geo. 4, c. 30, s. 8; *R.* v. *Howell and Others*, 9 P. & C. 437; 173 E.R. p. 901; 3 St.Tr. (N.S.) 1087. Their sentences were commuted to transportation largely owing to the exertions of Joseph Sturge; see H. Richmond, *Memoirs of Joseph Sturge* (1864), p. 261.

[74] It should be noted, however, that almost all offenders sentenced to imprisonment were also ordered to enter into recognisances, with or without sureties, to keep the peace for varying periods, often for as long as five years. In a number of cases the imprisonment was with hard labour. The sureties were usually high.

[75] *Parl.Deb.* (1840), 3rd ser., vol. 51, col. 853.

If further testimony is needed to refute mistaken detractors of Lord John Russell's administration in point of equity and mercy, the recognition of his forbearance expressed by an eminent soldier and by an eminent statesman, Sir Charles Napier and Disraeli, may be quoted. Disraeli, after referring to the incitement to outrage the law in the Newport rising as "a crime which includes all other crimes," was ready to declare the sentence imposed on the three leaders "a great, though a lenient, punishment." [76] Napier exclaimed in admiration of the leniency shown in 1839 and 1840, "Half the land has been openly in arms and not a drop of blood spilt on the scaffold." [77]

The growing apprehension at the use of the army in lieu of police

The persistence with which the Chartists proceeded with their recruitment and the simultaneous preparation of adherents in so many parts of the country soon made it a compelling reason why, in readiness for any sudden act of massed insurgency, more positive and energetic countermoves should be devised than those that now went with the government's counsels of toleration under vigilant surveillance. It was proper that threats to offend against public order should be met by firm preventive action immediately and on the scene itself. The antiquated system of constabulary, on whose unsteady arm the provincial magistrates had still to rely, afforded hardly the illusion of protection: the modern police force which since 1829 was ensuring in the metropolis the benefits of good order and safety threw into even greater relief the hopeless defects of the unreformed watch as regarded numbers, training and organisation; and if the failings of the latter in the performance of their duties needed further advertisement, after the dramatic proof of their incompetence during the disturbances that accompanied the passing of the Reform Act of 1832, the substantiation of graphic statements abounds in government reports of the time, for example in that of the commissioners inquiring into the county rates and allied matters (1826), in the review of the working of the municipal corporations in England and Wales (1837), and in the report of the commission whose investigations were to pave the way for establishing county police forces throughout the land (1839).

For some while the appointment of special constables as a resource for reinforcing the civil power in times of extraordinary

[76] *Parl.Deb.* (1839), 3rd ser., vol. 49, cols. 246–247, and *ibid.* (1846), 3rd ser., vol. 84, cols. 896 and 900.

[77] General Sir W. Napier, *The Life and Opinions of General Sir Charles Napier* (1857), vol. 2, p. 135.

stress had been creating more difficulties than it solved; they could no longer meet the demands upon their initiative, arising from the greater complexity of new industrial conditions.[78] The magistrates had no choice but to turn to them for the extra truncheons and help on the side of law and order—only to discover with increasing frequency that in a crisis the sum of this subsidiary strength was nil.[79] The Chartists were in possession of muskets in large numbers, and ammunition: "it was no wonder that special constables should shew some reluctance in the discharge of their duties, they being armed only with the weapon provided by the law for a constable."[80] Moreover, even supposing that their efficiency was beyond cavil, the wages for their services were an added burden upon the local rates, that barely sufficed for ordinary administrative purposes.[81]

Traditionally the yeomanry stood by to be summoned in the more violent outbreaks. In 1839 it had been called out in Shropshire, Montgomeryshire, Wiltshire, Westmorland, Worcestershire, Staffordshire and Warwickshire, as well as in a number of cities and towns.[82] Though it was normally under the orders of the Home Secretary, administered through the Lords Lieutenant, and could only be called out by the Lords Lieutenant or the magistrates, in 1842 it was placed at the disposal of the commander in chief of the northern district, when his regular troops became numerically inadequate to maintain the authority of the civil power.[83] Although the part played by bodies of yeomen in quelling the disturbances of 1839 was far from negligible, drawing from Lord Macaulay the warm tribute that in those trying scenes they had shown all the valour and firmness for which they were distinguished, the general policy of the Government was to employ them only in extreme need. Their presence was more unpopular than that of the regular army; ties of kindred and neighbourhood were likely to embroil yeomen in the disorders they had been mustered to calm. Another adverse consideration, which affected their use no less than that of special constables, was the additional expense involved in their payment, while in their case there was the further drawback of

[78] See vol. 2 of my *History of the English Criminal Law* (1956), pp. 215–224.
[79] See Lord John Russell's speech, *Parl.Deb.* (1839), 3rd ser., vol. 49 at col. 730.
[80] Lord John Russell, *Parl.Deb.* (1839), 3rd ser., vol. 47, col. 1025.
[81] *Ibid.* col. 621.
[82] Major Oskar Teichman, "The yeomanry as an aid to civil power, 1795–1867," *Journal of the Society for Army Historical Research* (1940), vol. 19, no. 73, p. 127 at pp. 138, 139 and 140; Thorn to the Home Office, July 16, 1839, H.O. 40/53; ditto, July 18, H.O. 40/53; ditto, July 25, H.O. 40/53; ditto, Aug. 14, H.O. 40/44; ditto, Aug. 16, H.O. 40/53; ditto, Aug. 24, H.O. 40/53.
[83] See Teichman, *loc. cit.* note 8 at p. 141. For the strength and distribution of the yeomanry, see "Return of the Number of Troops or Corps of Regiments of Effective Yeomanry of Great Britain according to the last Muster Roll, 4th June, 1839," *Parl.Pap.* (1839), Acc. and Pap., vol. 12, p. 308.

keeping farm workers away from their occupations, especially during the harvest.

In May 1839, the Government would appear to have reached the limit of their resources of manpower, and the recruitment of special constables to have subsided to a desperate level, for the Home Office to address a request to the Commissioners of Chelsea Hospital urging all pensioners to present themselves before the justices of the peace, when called upon to do so, in order to enrol for special duties; provision for their payment was sanctioned under an existing statute.[84] At Birmingham the number of these veterans volunteering their services was considerable: about 600 were sworn in. The response was less at other centres: at Bradford, for instance, 161 presented themselves, and 72 at Atherton near Leigh. Pensioners brought a certain element of unreliability with them; they did not submit cheerfully to rigorous discipline.[85] In Birmingham and Manchester it was found that one way of improving their morale and getting the best efforts out of them was to revive their old *esprit de corps* by drafting, whenever possible, former men of the same regiment into one company, a happy solution favoured by the Home Secretary himself.[86]

The readiness of citizens to associate for self-protection is a trait of English social consciousness that ever manifests itself in response to occasions of intensified lawlessness or widespread political discontent. But the few of these voluntary bands that survived the changes in class structure resulting from the spread of factories were not of much general use to the authorities; even if they were prepared to overlook amateur irresponsibility, volunteer services could be dispensed with now that there were so many precedents for employing the regular army to overawe large bodies of dangerous troublemakers. The army had first been lent as a servant to the civil power in an extremity during the seventeenth century: better had this measure remained in reserve, kept for extraordinary recourse, instead of hardening into an accepted procedure. Once a state of emergency was felt to exist, demands for military assistance multiplied, to the frequent embarrassment of the commanding officers.[87] If (as happened during the riot at Hindley in Lancashire) no officer was at the scene of the outbreak to direct

[84] See the letter from the Home Office to the Mayor of Carlisle, May 11, 1839, H.O. 41/14.

[85] See Maude (from Manchester) to the Home Office, Apr. 25, 1839, H.O. 40/43; Harewood, May 1, 1839 and enclosure, H.O. 40/51; Maude, May 5, 1839, H.O. 40/43; Jarvis, Aug. 6, 1839, H.O. 40/44; Shaw, Dec. 27, 1840, H.O. 40/54.

[86] See Scholefield, May 10, 1839, H.O. 40/50; Bradford Magistrates, Aug. 12, 1839, H.O. 40/51; Magistrates of Atherton, May 22, 1839, H.O. 40/37; Superintendent Beswick to the Mayor of Manchester, H.O. 45/268. And Home Office to Evans, May 6, 1839, H.O. 41/13.

[87] *Parl.Deb.* (1839), 3rd ser., vol. 49, cols. 727 and 728.

them, the troops showed an instinctive abhorrence of coercing their fellow countrymen with whom they had no quarrel.[88] In fact, so general was this antipathy among all ranks that it became the subject of a protest in Parliament by Colonel H. Salvey, "the military would be glad to be relieved from a most painful duty, and one which was repugnant to their feelings"[89]; it likewise made one of H. G. Ward's arguments in support of the Constabulary Bill.[90]

Fortunately, in many situations the demonstration by a regiment of its military solidarity was sufficient to overawe and subdue a mob: in July 1839, at Birmingham, after the Metropolitan Police (brought specially from London) had failed, in the dim twilight and through their unfamiliarity with the streets, to disperse the rioters, the troops were sent for; "these, by their mere presence, turned the fortune of the day."[91] But it was not always possible to bring this element into play as an isolated force, and their special belligerent training unfitted the soldiers to cajole and to humour—the most effective civil tactics for quelling a riot. This was the view held by Sir Richard Jackson, who had had varied experience in aid of the civil power, preceding Napier in command of the Northern District during these disturbances, and was regarded by Lord John Russell as "a competent judge on all subjects connected with both the military state of the army and the civil condition of the district in which he commanded"; he would have liked to restrict to exceptional cases this irregular employment of the military. He was altogether in favour of building up an effective police force: in 1838 he wrote to the Home Office urging that arrangements might be made under which "the staff of the constables [would be] respected by all and the military kept to their more immediate duties for which this sort of service is not calculated to improve them."[92] Their duties as an arm of the civil power, he said, tended to break and destroy their discipline as troops.

But the incompatibility of a soldier's temperament with the police duties he was thus made temporarily to assume and the deterioration in military conduct that resulted were not the only shortcomings in this system of control. The other defect lay in the shortage of troops, making it impossible to comply with all the demands for assistance. In 1830 the army consisted of only

[88] See Balcarres's letter to the Home Office, Aug. 13, 1839, H.O. 40/37.
[89] *Parl.Deb.* vol. 50, col. 255.
[90] *Ibid.* vol. 49, col. 737.
[91] M. D. Hill, *Repression of Crime* (1857), p. 2.
[92] Letter of Dec. 12, 1838, H.O. 40/39.

11,000 men, of whom 7,000 were stationed in London.[93] In 1838 Lord John Russell had been confident that the strength was sufficient [94]; but a year later he was asking for an increase.[95] Some of the depot companies consisted of only 139 men, and others of 180, whereas the minimum strength required was at least 200.[96] In April 1839, the forces under Napier's command numbered 5,000–6,000 men and 18 guns [97]; in August they were estimated at about 8,000.[98] These troops were deployed over nearly half the country and had to protect very many actual and potential points of conflagration, the four main concentrations of Chartist strength after 1836 being London in the south, Birmingham in the Midlands, Newcastle and Leeds northward, and, in Scotland, Glasgow, with Manchester making an important fifth from about 1839 onwards.[99] So it is not surprising that again in 1840, though the state of the country gave less cause for anxiety, the government was constrained to seek from Parliament yet another accession to the total land forces and met with little opposition.[1] The ill-arranged distribution of available detachments in the disturbed districts was sometimes due to the general shortage, sometimes to the lack of billets or barracks to accommodate them,[2] often to the incompetent methods and narrow selfishness of local officials. The rising at Newport in November 1839, when some three thousand colliers led by John Frost marched on the town, caught the authorities with only a scratch force of regular and special constables and thirty-five men of the 45th Infantry Regiment to oppose them: early warning of the move would not have altered the fact that they might whistle for reinforcements.[3]

Most of the objectionable features, illustrated above, in this use of troops as a makeshift for bolstering up the over-taxed strength of the civil administration might have been remedied or relieved by a modicum of forethought and common sense on the part of the chief local authorities, had they shown passable competence and alacrity. It was unfortunate that, although the intensification of industrial activity was throwing into prominence able men of a new

93 E. Halevy, *History of the English People, 1830–1841* (1927), p. 57.
94 See his letter of Dec. 2, 1838, to Melbourne, in Russell Papers, G. & D. 22/3.
95 *Parl.Deb.* (1839), 3rd ser., vol. 49, col. 620.
96 *Ibid.* col. 1150.
97 For more details see Jackson's letter to the Home Office, Feb. 27, 1839, H.O 40/53. See also Hill's letter to the Home Office of May 1, 1839, H.O. 40/53.
98 See Lieut-Gen. Sir W. Napier, *The Life and Opinions of General Sir Charles James Napier* (1857), vol. 2, pp. 22, 73 and 7.
99 M. Beer, *A History of British Socialism* (1927), vol. 2, p. 3.
1 *Parl.Deb.* (1840), 3rd ser., vol. 52 (March 9) "Supply: Army-Estimates," col. 1081 at col. 1094.
2 See, for instance, *Parl.Deb.* (1839), 3rd ser., vol. 49, July 26, "The Chartists," cols. 914–915.
3 See Hovell, *op. cit.* p. 175, and Beer, *op. cit.* pp. 96–97.

class possessing energy and sound practical attainments, they as yet remained outside the exclusive circle whence justices were drawn; election to that office was still the prerogative of the county squires, land-owners and men of private means, the slow current of whose lives did not prepare them to shine in the emergencies of political unrest.

The exasperating methods of these provincial magistrates, and the special tribulations and many grievances of the military heads caused thereby, have been uniquely treated by the greatest commander of the period, General Sir Charles Napier, in his journal and official correspondence.[4] Napier came of a distinguished family of soldiers with a tradition of strong liberal sympathies. His service abroad was brilliant; but his greatest claim to the gratitude of his countrymen lay in the humanity and wisdom with which he discharged at home the difficult task of maintaining public order in his term as commander in chief of the Northern District. His broadminded understanding of the Chartists' cause prevented much unnecessary bloodshed: his keen sense of humour transcended the selfishness and blunders of the civic officials with whom he had to collaborate. His journal, a diary of events punctuated by utterances of his own subjective reactions, sparkles with drama, humour and vivid interludes; it proves him to be a gifted cartoonist in prose, but it also proves itself a singular source of intimate facts which illuminate more than just the arena in which the events take place. "Alarm! Trumpets! Magistrates in a fuss. Troops! Troops! Troops! North, South, East, West. I screech at those applications like a gate swinging on rusty hinges; Lord how they make me swear!"[5] In these words Napier expressed his vexation at the importunate, unceasing clamour for troops which made the term of his command, as it had made his predecessor's, a period of irritation and embarrassments.[6] "I shall be defeated by the magistrates," ran one despairing entry in his journal, "they are so powerful; but the safety of the country is at stake and I will do my utmost."[7] According to Napier, if the magistrates had been less irresponsible and more soberly conscientious in doing their duty, so many hysterical calls for armed assistance would never have harassed the Government and forced them to hand over all the available troops—and even to raise fresh supplements—for the sake of maintaining order. In fact, nine detachments out of every twelve would have been redundant.[8]

[4] Lieut.-Gen. Sir William Napier, *The Life and Opinions of General Sir Charles J. Napier* (1857), vol. 2.
[5] *Life and Opinions*, vol. 2, p. 66.
[6] Letter of Sir Richard Jackson, Dec. 19, 1838, H.O. 40/39.
[7] *Life and Opinions*, vol. 2, p. 63.
[8] *Ibid.* p. 79.

But the calls for troops came on the slightest pretext: it might be that a quarrel had arisen among a few railroad labourers, or that owing to the lack of constables there was no one to arrest some persons guilty of disorderly conduct,[9] while, in genuine cases of rioting, exaggerated reports of the dangers were sent with the summons for help and the magistrates hurried to a safe distance to await their sorely tried rescuers. At Loughborough, on one occasion, the town messenger covered the distance to military headquarters at a gallop and announced that life and property were threatened; Napier describes the sequel, how the troops on arrival found the town "in alarm, but not in flames; the magistrates were alive, but had removed, the nearest to six miles' distance. Captain King, unable to act, sent to seek the runaways, and at ten o'clock at night by threatening to leave magistrates and Chartists together, got one of the former in presence. I reported all this and Lord John gave them—*a gentle reproof*!" [10] But soreness of temper at the irritation of these needless alarms might end in good humour when the folly of an episode had mounted to an overwhelming pitch of absurdity: "August 12th, . . . came a call for troops to disperse a mob in the country. I rode out, ordering dragoons to follow me. Mr. N— and I found the mob, which would not notice us and marched on. Old N— put on his spectacles, pulled out the riot act, and read it in an audible voice—to whom? Myself and about a dozen old women, looking out of their doors, to see what we were at! We came back, found another mob, and ordered it to disperse. No. N— told *me* to disperse it. I laughed, the dragoons laughed, the young women of the mob laughed, and then old N— laughed, and so the second act of folly passed. Hardly home, however, when a second call came; then a third; a fourth; each time we were paraded in order of battle and each time we were laughed at: so the day passed in great excitement." [11]

A few occurrences of this nature were sufficient to shake his faith in the good judgment and truth of civic officials' reports; very early in his appointment he had jotted down in his diary that the magistrates were "all under personal fear and political prejudice" [12]; and he found it safer to arrange for direct intelligence of affairs through his own system of military surveillance. At the end of his term he passed this summary judgment upon the two sorts of magistrate: "The Tory magistrates are bold, violent,

[9] *Ibid.* p. 44.
[10] *Ibid.* p. 66.
[11] *Ibid.* pp. 71–72.
[12] *Ibid.* p. 11.

irritating and uncompromising; the Whig magistrates sneaking and base, always ready to call for troops, and yet truckling to the mob." [13]

In his observations upon other drawbacks and failings in the military's superintendence of civic order, he regretted the adverse effect on the initiative and self-respect of the local authorities caused by their increasing reliance upon outside assistance; and he deplored the impairment of the soldiers' high standards of discipline that resulted from separation into small shifting detachments, from damaging familiarity with the townspeople in their billets, and from the unsuitability of most of the barracks—the proportion of defaulters under such circumstances being high.[14] Napier was far from condemning the use of military assistance in preserving the peace, but he felt that the request for troops should be deferred for a climax greater than that at which the civil powers generally yielded: "the putting down one riot by constables, has more good effect than putting down ten by soldiers: it also gives the civil powers confidence in themselves, which is very desirable." [15] However, as long as there was no effective police force, the calling out of the military was inevitable. Referring to Manchester, Napier wrote on May 25, 1839: "What are five hundred constables and specials in a town which would turn out fifty thousand people to see a dog-fight?" [16] And in another place he is ready to acknowledge the plight of the civilian population: "Two or three, perhaps two or three dozen, shopkeepers, quailing under fears of all kinds, natural fears, fear of exclusive dealing, of private vengeance. Men as helpless as their magistrate, are thus opposed to a rough set who are perfectly aware that these constables are helpless, and are themselves, therefore, every man a hero in the crowd, ready to commit any crime his heart may desire. What is the result? Outrage! Call in the troops!" [17]

Apart from a few isolated instances of defaulting—when the environment and its influences were rightfully to blame—and one or two cases of insubordination,[18] the loyalty of the troops stood up against temptation and provocation in a remarkable way. Attempts to break their discipline were made on several occasions; they had pamphlets and newspaper articles thrust into their hands by the agitators.[19] But they maintained a commendably impersonal

[13] *Ibid.* p. 155.
[14] *Ibid.* p. 81.
[15] *Ibid.* p. 116,
[16] *Ibid.* p. 39.
[17] *Ibid.* p. 64.
[18] See Napier's letter of May 17, 1839, H.O. 40/53; and *Life and Opinions*, vol. 2, p. 49.
[19] See Wemyss's letter to the Home Office, Feb. 24, 1839, H.O. 40/43; and Napier's letter, July 29, 1839, H.O. 40/53.

attitude towards those whom they were engaged to coerce; their only demonstrations of ill-feeling seem to have occurred in a few sharp collisions between themselves and the police.[20] But even while praising the troops for their successful support of civil authority in general, when no other agency was at hand, writers and public commissions of inquiry have denounced the particular use of them in settling industrial strife, above all in the early stages, when persuasive firmness, good humour and unobtrusive precautionary measures can do so much to arrest the spread of riotous behaviour or to prevent a local affray from flaring into mass violence. On the one hand it has been said: "there can be no doubt that the constant employment of the military in industrial disputes and ordinary disturbances must have done something to lessen the awe they inspired among working men" [21]; and on the other, "the soldiers either do nothing, or too much. The populace will not believe that the bullet or the bayonet will actually be used until too late, and all parties lament the result." [22]

In the year 1839 appeared the *First Report of a Royal Commission appointed to inquire into the best means of establishing a constabulary force in England and Wales.*[23] With the practical experiment before them of an army striving to perform a role for which it was not fitted, the commission had much to say in commendation of the mobility and individual independence of the police constable under the new system: his training in the use of all means before resorting to force marked him off from the soldier and made him the ideal preventive agent. Their approbation was fervently echoed by the Assistant Handloom Weavers' Commission in the following year: "every individual constable is daily and hourly in the exercise of discretion, and without it he would be incapable of his duties. Policemen soon learn to know the person of every man who makes himself conspicuous. . . . Whatever outcry may be raised against a police force at first, the experience of London shows that they will soon become popular. Ever since the London police and the London mob fairly tried their strength, and the police proved their superior power, there has been no further contest." [24]

Chartism carried a warning that could not be ignored: political and social reforms were of course essential, but they should not

[20] Home Office correspondence, Dec. 5, 1838, H.O. 41/13, and Napier's letter to the Home Office, June 24, 1839, H.O. 40/53.
[21] J. R. M. Butler, *The Passing of the Great Reform Bill* (1914), p. 422.
[22] Dr. J. Mitchell, one of the assistant commissioners, in "Reports from Assistant Hand Loom Weavers Commissioners," part 2 (43.–I), *Parl.Papers* (1840), vol. 8, p. 184.
[23] *Parl.Pap.* (1839), vol. 19, p. 1.
[24] "Reports," *Parl.Pap.* (1840), vol. 8, pp. 184–185.

be attempted by force. And, according to Napier, "to avoid danger to the throne," the army should be kept clear of the people; to this end there should be an effective police force. If the police "become contaminated with the democratic spirit, you have your military force in reserve and the throne is safe. Whereas if the military are contaminated you have no reserve, the throne would be first degraded and then overturned. For these reasons we should in our present state of bad government, public debt, manufacturing and general discontent, have stipendiary magistrates and an armed police." [25]

The reform of the constabulary

"They have an admirable police at Paris," wrote J. W. Ward in 1811, "but they pay for it dear enough. I had rather half a dozen people's throats should be cut in Ratcliffe Highway every three or four years than be subject to domiciliary visits, spies, and all the rest of Fouché's contrivances." [26] As the 1830s neared their end, however, the manifest efficiency and public loyalty of the new Metropolitan Police had begun to disarm any suspicion that the executive intended to use them as spies or oppressors; and, amid these hopeful signs, a Royal Commission was appointed "to inquire into the best means of establishing a constabulary force" to serve the English and Welsh counties. Although the state of crime and the disgraceful impunity of offenders in those days offered a perennial pretext for such a step, the immediate occasion of the commission was the wave of unrest which had followed the introduction of the amended poor law system. It seems that, in protest against the changes in the organisation of the parishes under the Amendment Act of 1835, there were riots in several parts of the country and many letters requesting aid were received by the poor law administrators from local authorities who found their stout but ponderous constables quite unequal to the intense opposition so unexpectedly raised. Chadwick, at that time an assistant commissioner for poor law, in the course of his administrative duties was assiduous in gathering from these communications evidence of the "utter inefficiency of the local constabulary"; looking back nearly twenty years later, he recalled its effect upon him: "this experience of the local deficiencies of means for the preservation of the peace (of which indeed we had previous experience in the agricultural riots and fires of 1830), as well as for the ordinary

[25] *Life and Opinions*, vol. 2, p. 65 (entry dated July 26, 1839).

[26] See John William Ward, *Letters to "Ivy"* (1905), p. 146. On the Ratcliffe murders and their significance in the movement for the reform of the police, see my *History of the English Criminal Law*, vol. 3 (1956), p. 315 *et seq.*

service of a constabulary in various counties, appeared to me to make it my duty to represent to Lord John Russell . . . the importance of the issuing a Commission to inquire whether the like deficiencies prevailed throughout the country. In consequence . . . a Commission was issued . . . ." [27]

But the phobia of a " French police " was difficult to dislodge from the public mind while it was sustained by the declared views of such eminent figures as, for instance, Disraeli; and the recommendations of the Royal Commission published in 1839 could be used by the opponents, and were used even more often by them than by the supporters, of reform. So various projects for improving the means of maintaining order might have continued to be ravelled and unravelled, had not the militant Chartists in that series of riots and lesser disturbances precipitated the authentic conditions for putting to a stringent proof the total efficacy in maintaining order of the standing constabulary and those ultimate reserves, the special constables, the yeomanry and the army; and for showing up the weaknesses of the intermediary authorities who controlled the timing and nature of decisions upon the intervention or co-ordination of the inhomogeneous units. As has been set out above, the events everywhere palpably condemned both the antiquated devices for law enforcement and the improvisation needed to supply their defects; and left no doubt that, as a peremptory concession to the critical state of affairs, the new arrangement succeeding so well in the twenty or so Metropolitan Police offices should without delay be suitably reproduced to cover the whole country.

In 1839 Lord John Russell joined his efforts to Peel's for the achievement of the necessary legislation; and, in the course of barely three months, nine Acts were carried for the new establishment or the further improvement of police forces [28]: in Birmingham, Manchester and Bolton, police offices were established upon the pattern of those of the Metropolis; the jurisdiction of the smoothly working Metropolitan forces was augmented, while a stiff penal sanction gave its officers better protection from assault in the performance of their duties; and the foundation was laid for the establishment of constabulary forces in all the counties. The haste with which the legislation was effected can be gathered with reference to the Birmingham Police Bill when Lord John Russell felt constrained to reverse the usual procedure and take the order of

[27] " Second Report from the Select Committee appointed to consider the expediency of adopting a more uniform system of police in England and Wales, etc." (715) *Parl.Pap.* (1852–53), vol. 36, p. 163, evidence no. 3638 at pp. 253–254.

[28] 2 & 3 Vict. cc. 15, 44, 47, 64 (local), 71, 87, 88, 93 and 95.

the day for a committee before the notices of motions.[29] There is a touch of dramatic irony in this precipitate haste of one who regarded the police establishment as a mere dispensable innovation, an "extraordinary measure" which he would gladly have postponed had the state of the country suffered him to do so.[30]

For his share in introducing these reforms in the machinery of justice—which lent a new firmness and effectiveness to the civil power and restored its respect in the eyes of the nation—Russell ranks next to Peel as a promoter of the modern police system. When the Bills were being debated in the House, at each division he and Peel were usually to be found in the same lobby; but, while to Peel a reliable police system covering the whole country was a cherished part of a deliberate far-sighted purpose closely connected with some essential changes in criminal law and procedure,[31] to Russell police reform was a compulsory step forced upon him by the pressure of events. His emphatic though brief reference, made during the hectic parliamentary activities of August 1839, to the inefficient state of the ordinary administration of criminal justice which allowed depredators of every description to enjoy easy impunity shows him to have been appreciative of its chronic defects; but the uppermost consideration influencing him and many others—Sir John Graham, J. S. Parkington, H. G. Ward, H. Warburton and Lord Melbourne—was the immediate need to arrest the spread of the Chartist movement: had the Chartist agitations perhaps subsided, he would not have taken up the matter of police reform in the towns and county districts at all.[32] The recurrence of riots and other disturbances forced him to choose between two expedients both of which he distrusted, one of extraordinary legislation and all that it implied on the model of Lord Sidmouth's "Six Acts" of 1819, and the other of extending the police. He chose the second course, and thus largely against his own convictions acquired a prominent place alongside Peel among the reformers of the antiquated system for preserving law and order.

[29] *Parl.Deb.* (1839), 3rd ser., vol. 49, col. 691. See also the remarks of Lord Brougham and Disraeli during the debate on the County and District Constables Bill, *ibid.* cols. 602 and 731.

[30] *Parl.Deb.* (1839), 3rd ser., vol. 49, col. 1385.

[31] See vol. 1 of my *History*, p. 566 *et seq.*

[32] *Parl.Deb.* (1839), 3rd ser., vol. 49, cols. 728, 735, 736, 737; vol. 50, col. 7; vol. 49, col. 705.

DEMONSTRATIO

D. I. C. Ashton-Cross

In the formulary system of classical law the praetor prescribed the form in which the issue should be submitted to the *judex*, in the sense that he approved the issues agreed by the parties. These issues would be embodied in a *formula*, but the praetor was under no duty to see that it correctly stated the dispute between the parties, and the possible defences. A *judex* having been appointed and the *formula* having been issued and accepted by defendant [1] *litis contestatio* took place, and the parties were bound by the *formula* as by a contract. The *judex* was instructed or authorised to proceed in accordance with the *formula*.[2]

From the *formula*, therefore, the *judex* must be able to understand at least the point at issue between the parties, and what plaintiff claims. The *formula* could contain many parts, but for the purposes of this article it is necessary to consider two only, the *intentio* and the *demonstratio*. The function of the *intentio* (which must in some form appear in every *formula*) [3] was to define the issue submitted to the *judex*, *e.g.*, "If it is proved that the slave in dispute is the quiritary property of plaintiff" (*intentio in rem*); or "If [*or* whatever] it is proved that defendant is bound to pay [*or* give to *or* do for] plaintiff" (*intentio in personam*); or "If it is proved that plaintiff deposited a table with defendant" (*intentio in factum*).

The *demonstratio* was ancillary to the *intentio*, which it preceded in the *formula*. Briefly its purpose was to make clear to the *judex* the right or obligation on which plaintiff based his claim where that was not clear from the *intentio*, as often it would be, *e.g.*, in the *intentio in factum* above no *demonstratio* would be required. Many *formulae* however, and as a generality all *formulae* claiming an *incertum*, would be meaningless to the *judex* without a *demonstratio*, for instance if he was directed simply to condemn to "Whatever is proved to be due".[4]

In form the *demonstratio* was a narrative of apparently admitted facts, starting with the word "*quod*," *e.g.*, "Whereas

[1] My underlining.
[2] Generally see Buckland, *Text-Book of Roman Law*, p. 632.
[3] Buckland, p. 652.
[4] Buckland, p. 649.

plaintiff deposited a slave in the hands of defendant." Then would follow the *intentio* "Whatever it is proved that defendant is bound to convey or render to plaintiff." There was, it seems, one *formula* in which a *demonstratio* was not used although the material facts of the transaction could not be ascertained from the *intentio*—the *condictio certi*. In that action the *intentio* ran "If it is proved that defendant is bound to pay plaintiff 100".[5] There is no satisfactory explanation of this exception. It may have been a historical survival from the *condictio* of the *legis actio* period in which for some unknown reason plaintiff was not required to state his ground of action.

An error in the *intentio* was fatal in the sense that once *litis contestatio* had taken place the action actually brought must fail because of the error, and no further action could be brought on the same transaction. This did not, however, apply to an error in the *demonstratio*. A *falsa demonstratio* was held not to have brought the real question into issue. It was fatal to the immediate action, for reasons which will appear[6] but it did not bar a fresh action on a correct *formula*. This will later be referred to as "the *falsa demonstratio* rule."

It is my view that the facts stated in a *demonstratio* on which a *judicium* could follow must be admitted facts, and admitted to both the praetor and the *judex*. It has been said elsewhere that in no *formula* which contains a *demonstratio* need the facts be admitted. This, of course, includes all *bonae fidei* actions. In all such, it has been maintained, whether or not the existence of such obligation is disputed by defendant, the *formula* must contain a *demonstratio* alleging that obligation, in form as an admitted fact, without any indication of the dispute anywhere in the *formula*.[7] Buckland at leasts suggests this when he says[8] that a *demonstratio* was not necessarily a statement of admitted facts, though it often might be; adding later, somewhat vaguely, that it occurred, "apparently in all *bonae fidei judicia*"—with a reference to Gaius IV. 47. Further it has been contended that even if plaintiff and praetor are aware that defendant disputes the fact of (say) a sale, nevertheless the *formula* sent to the *judex* must include a *demonstratio* which will run "Whereas plaintiff has [sold] (something) to defendant."

Difficulties which at once come to mind are:

1. Why does defendant, if he disputes the fact of sale, accept

[5] Buckland, p. 650. [6] G. IV.58; Buckland, pp. 650 and 702; *post*, p. 84.
[7] Unless in the rare case where a *praescriptio* is inserted, *e.g.*, *ea res agatur de fundo mancipando*.
[8] p. 650.

the *formula*, thus making the *litis contestatio* amount to a contract between the parties [9] ? I know of no answer.

2. The *formula* will be exactly the same in two completely different situations (i) where defendant disputes that there was a sale at all; and (ii) where he does not dispute the sale, but questions what plaintiff claims on the basis of such sale. This seems to me so absurd that, I venture to say, it must be wrong.

3. The illogicality of using a form of words which " apparently states a fact when the truth or falsehood of that fact is one of the matters which the *judex* has to decide; one would have expected ' whereas the plaintiff alleges that he has sold ' or something of the sort." [10] To get over this third difficulty it has been argued that—

(a) *Quod* in the *demonstratio* means " if," not " whereas." [11] It has been suggested, too, that there is no logical reason why the *demonstratio* should not begin " If " seeing that in all *formulae* the issues for plaintiff and defendant are set out in a series of hypotheses. Thus in a *condictio certi* the *intentio* might run " if it be proved that defendant came under a legal obligation to pay plaintiff 100 " followed by (*exceptio*) " unless there was a pact not to sue " and so on. This *exceptio* does not admit the truth of the *intentio*— what defendant says in effect is " assuming but not admitting that I came under legal obligation, I maintain that plaintiff's agreement not to sue bars him from recovering." Plaintiff must then first prove his *intentio* (unless, of course, defendant admitted it before the *judex* and so dispensed with proof by plaintiff) and only if plaintiff succeeded in establishing the original obligation would defendant be called on to prove the agreement not to sue. In form at least the *demonstratio* does constitute an admission. Further points against this proposition that *quod* means *si* are:

(i) For the operation of the *falsa demonstratio* rule [12] it is essential to make a clear distinction between *intentio* and *demonstratio*, and one which is apparent on the face of it.

(ii) Numerous passages of Gaius regard a *demonstratio* as quite apart from an *intentio*.[13]

(iii) Both Buckland and Jolowicz are against *quod* meaning *si*.

(b) In such a case of disputed sale the *judex* could disregard the *prima facie* admission of the fact of sale and require plaintiff to

[9] This was the dominant view of *litis contestatio*: Buckland, p. 632.
[10] Jolowicz, *Historical Introduction to the Study of Roman Law*, p. 212.
[11] Schulz, *Legal Science*, p. 258.
[12] *Ante*, p. 82.
[13] *e.g.*, IV.39, 40, 44 and 58/60.

prove it.[14] This, if true, is very odd. It would be illogical, as Jolowicz has pointed out, and it would conflict with Buckland's statement, which will be discussed in the next paragraphs, that an *intentio* preceded by a *falsa demonstratio* did not put the real question into issue and that the truth of a *demonstratio* is a condition of the submission of the *formula* of the *judex*.

If the fact of sale was disputed before the *judex* I submit that the action must fail for want of *litis contestatio*, but that this was no bar to another action. To some extent this view is supported by Buckland. Writing of *demonstratio* in general, and not particularly of *demonstratio* in a *bonae fidei* action, he says [15] that "it was not a critical part. Errors in it could be adjusted. . . . *Plus petitio* or *minus petitio* in it could be set right in the sense that a new action could be brought the *litis contestatio* not having been operative.[16] . . . If the matter was wholly wrongly described in the *demonstratio* there was no valid *judicium*; the *intentio* referred explicitly to the case in the *demonstratio*, and the real question had not been put into issue.[17] . . . A *demonstratio* contained . . . the words '*qua de re agitur*' or the like, the logical basis of the rule that error in the *demonstratio* excluded the real issue from the *judicium*."

Much later Buckland adds [18] "An overstatement in the *demonstratio* was fatal to the action but Gaius says [19] *nihil in judicium deducitur*: the action could be renewed." The effect is that if the *demonstratio* is not true there was no action; its truth is a condition not on *condemnatio* but on submission to the *judex*.[20]

Surely this reasoning must apply whether the *formula* which contains the *falsa demonstratio* was based on a *bonae fidei* obligation or other *causa*—no *judicium* could follow. Plaintiff could, of course, start all over again, with a new (rather than renewed) action on the same (say) disputed sale. This new action if it must be formulated *bonae fidei* will once more contain a *falsa demonstratio*, and the new *judex* must reject it for the same reason as the first. This could go on *ad infinitum*—could anything be more ridiculous? The plaintiff through a mere technicality of pleading would be for ever deprived of a remedy.

What reason requires is that plaintiff who alleges a sale in an action, knowing that defendant denies that he bought, should bring

[14] "The fact that a sale was alleged in a *demonstratio* did not dispense with the necessity of proving it, if disputed": Buckland, p. 650.
[15] p. 650.
[16] Gaius IV.58. *Si in demonstratione plus aut minus positum sit, nihil in judicium deducitur et ideo res in integro manet.*
[17] My underlinings.
[18] p. 702.
[19] IV.58.
[20] My underlining.

the fact of sale into issue before the praetor, and that in any approved *formula* the fact of dispute should be apparent. The praetor might take one of several courses: (i) He might himself hear the parties on the dispute of sale—*causa cognita*; I do not fancy this: or (ii) Issue a *praejudicialis formula* directing a *judex* to decide only on the fact of sale; this too I dislike because if the sale was proved the action would have to go either to the same or to another *judex*—two bites at the one cherry: *or* (iii)—and this I regard as the simplest and best course—issue an *intentio in factum* "If it is proved that plaintiff sold to defendant the slave Stichus" with an authority to condemn for the full price, much on the lines indicated by Gaius for an action based on alleged deposit "*quanti ea res erit tantam pecuniam condemna*," modified to suit the particular case.[21] This is not, of course, a *bonae fidei* form of claim for compensation, but the defendant who denied the sale unsuccessfully was not *in bona fide*, and should, therefore, pay at least the full price.

Let us now consider whether there is anything in the text against the submission that the fact of sale should be brought into issue before the praetor. Following a remark that there are innumerable *formulae in factum* in the praetor's *album* (which *album* would, presumably, be freely available to Gaius' students and much discussed by and with them) Gaius goes on to mention [22] that in certain cases, for instance (*veluti*)—note that he does not say only in—*depositum et commodatum* the *formula* may be either of law or of fact. He then gives by way of example two actions on deposit, first, the ordinary *bonae fidei* action with a *formula in jus*, the *demonstratio* running "Whereas plaintiff deposited a table with defendant"; second, an action formulated *in factum*—"If it is proved that plaintiff deposited a table." There is no suggestion whatever that in Gaius' time the first could have been used as an alternative to the second if the fact of deposit was disputed. On the contrary, the far more likely meaning is that the different *formulae* were appropriate to varying circumstances. It may be a pity that Gaius, if he so meant, did not make his point clear beyond dispute, but as Buckland has pointed out [23] he was often careless in his mode of expression and "far from an exact writer." Certainly Gaius does not say that the actions were alternative—his actual words being (IV.47) "*praetor et in jus et in factum conceptas formulas proponit.*"

21 Gaius IV.47. There the claim was for a *res*, on which a value could not be put. In a claim for a price the *condemnatio* might run "for the price at which the slave was sold, judge condemn."

22 IV.46 and 47.

23 "Reflections Suggested by the New Fragments of Gaius" (1936) *Juridical Review*, 339, particularly pp. 354–364.

The same text [24] given by Buckland as an authority for his statement that all *bonae fidei judicia* (if these words mean actions which have "*ex bona fide*" in the *intentio*) must apparently have a *demonstratio* [25] does not afford much support to that proposition since it contains but one such *formula*. Another possible meaning of "*bonae fidei judicia*" is actions in which the *causa* is a *bonae fidei* obligation. Read in this sense the text would contradict Buckland's proposition for it seems clear that in Gaius' view an action based on an alleged *bonae fidei* obligation need not contain a *demonstratio* when that obligation was disputed.

It is popularly held that it was only to the two contracts of *depositum* and *commodatum* that Gaius' two actions applied, in other words that Gaius used *veluti* in an exhaustive sense. Barry Nicholas has written on the meanings to be attributed to *veluti*.[26] He concludes that it is most often used in an illustrative sense, but that it is at least possible that in some passages of Gaius it is used in an exhaustive sense. He quotes several in support of his view, but does not include IV.47. Anyhow if Gaius meant a list rather than examples one would have expected "*ex duabus causis*" rather than "*ex quibusdam causis*."

Gaius often starts with a generality followed by particular instances. Sometimes, but not always, he indicates that the particulars do not exhaust the possibilities. For instance:

(i) IV.23–4. *Aliae leges ex quibusdam causis constituerunt quasdam actiones . . . velut lex Furia testamentaria . . . lex Marcia . . . et si quae aliae similes essent.*

(ii) IV.22 *Ex aliis quibusdam causis . . . sicut lex Publilia . . . lex Furia . . . et denique complures aliae leges in multis causis.*

An example of contrary practice is—

(iii) IV.28. *Lege . . . introducta est pignoris capio veluti lege XII tabularum. . . . Item lege censoria data est pignoris capio.*

The standard explanation of the two *formulae* of Gaius IV.47 is that the *actio in factum* was a historical survival [27] and this may well be true. Gaius may or may not have realised it but while he does not indicate in what situation either *formula* was appropriate at

[24] *Sed ex quibusdam causis praetor et in jus et in factum conceptas formulas proponit veluti depositi et commodati.* [This sentence is followed by two *formulae* for an action on deposit, the first *in jus* with a *demonstratio*, the second *in factum*.] Gaius goes on *similes etiam commodati formulae sunt.*

[25] p. 650.

[26] (1953) 69 L.Q.R. 63, 65.

[27] Buckland, p. 468. "The original *formula* was *in factum*."

least he does not say nor in any way suggest that the *bonae fidei* was the proper form when the *causa* was disputed.

It is submitted, then, that the proper function of the *demonstratio* was, to use Buckland's words,[28] to act as " a short statement of the transaction on which the claim rested as a guide to the *judex*. It need not state the wrong, but rather the facts which constitute the legal relation in connection with which the wrong is alleged." It was not a statement of the issue, which those who maintain that there must be a *demonstratio* alleging a sale in the *formula* for a disputed (say) sale distort it into being. The inclusion of a *demonstratio* in such a *formula* would confuse rather than guide the *judex*.

On the *formula* on which judgment could be pronounced there must have been *litis contestatio*, and as has appeared [29] there could be no *litis contestatio* if there was error in the *demonstratio*.[30] The action could be abandoned and a new one started because there had been no true joinder of issue. In this sense only was a *demonstratio* not necessarily a statement of admitted facts—it did not, if *falsa*, bar fresh action.

In conclusion, it is suggested that rather than to name the *formulae* in which a *demonstratio* is appropriate, it is simpler and possibly more accurate to say no more than that it should be used in any *formula* (except *condictio certi*) the *intentio* of which does not make clear to the *judex* the transaction or right on which the plaintiff founds his case. The effect of a *falsa demonstratio* is to cause delay but not to destroy rights of action. Obviously there can be no procedural objection to the inclusion of an unnecessary but true *demonstratio*.

I am most grateful to Professor R. Powell (London), and to Professor P. W. Duff and Mr. R. W. M. Dias (Cambridge) for their advice and interest.

[28] p. 649.
[29] *Ante*, p. 84.
[30] See too Girard, *Manuel de Droit Romain*, p. 1036: " *Si la formule contient une inexactitude, le juge n'a pas le droit de la rectifier . . . Il en est du même s'il s'est fait délivrer une formule dont le demonstratio est inexacte.*"

NONSUIT: A PREMATURE OBITUARY

M. J. Prichard

Clack v. *Arthur's Engineering Ltd.*,[1] offered to the Court of Appeal the now rare opportunity to emulate Uriah Heep and seek inspiration from the pages of *Tidd's Practice*.[2] The occasion was a consideration of the old common law practice of nonsuit; but while demonstrative attention was again given to that great work, it does not seem to have excited quite the same admiration, for the Court concluded its judgment with the recommendation that the power to nonsuit might be abolished in the county court, as it has been in the High Court. The practice was one which it ventured to think "few practitioners of today fully understand."[3]

The curious survival in the county court of the power of nonsuit is carefully traced in the judgment of the Court of Appeal.[4] It was conferred upon that court by section 79 of the original County Courts Act, 1846, and survived the Judicature Acts, 1873–75, in the same limited way in which it survived in the High Court.[5] But whereas nonsuit disappeared from the High Court with the introduction of the Rules of the Supreme Court, 1883,[6] it was specifically preserved in the county court by section 88 of the County Courts Act, 1888. This provision was not included in the consolidating Act of 1934,[7] but survives in substance in the County Court Rules, 1936, Ord. 23, r. 3.

In *Clack's* case the plaintiff had brought an action in the county court for damages for wrongful dismissal. The judge preferred the evidence of the defendants to that of the plaintiff and found that he had not proved his claim to have been engaged for a fixed period. No other question arose on the pleadings as they stood, as the plaintiff had previously declined the judge's invitation to amend them to include a claim based on the absence of proper notice. The judge did not, however, give judgment for the defendants, but merely nonsuited the plaintiff.

The defendant appealed on three grounds, of which the first

[1] [1959] 2 Q.B. 211.
[2] *David Copperfield*, chap. xvi.
[3] [1959] 2 Q.B. at p. 225.
[4] [1959] 2 Q.B. at pp. 217–218.
[5] See *Poyser* v. *Minors* (1881) 7 Q.B.D. 329.
[6] See *Fox* v. *Star Newspaper Co., Ltd.* [1900] A.C. 19.
[7] But see s. 99 (3) (*d*) and Sched. III.

alone raised any point of historical interest. This was the contention that the power to nonsuit a plaintiff could not be exercised without his consent.

At first sight the wording of the present rule might seem to provide a straightforward answer to this, as it states that "where the plaintiff appears but does not prove his claim to the satisfaction of the court, it may either nonsuit him, or give judgment for the defendant." But the County Courts Act, 1846, had also appeared to give an unfettered discretion to the judge yet the courts had imported the common law practice of nonsuit *in its entirety*, and there could be no doubt of the direct line of descent from that statute to the present rule. The "powers of the county court today in relation to nonsuit" had therefore to be "related to the practice of the old courts of common law as it existed prior to 1873." [8]

Could, therefore, a plaintiff be nonsuited against his will at common law? In the Court's view he could be, certainly after verdict, and even before verdict, if all the evidence on both sides had been taken.[9] But this conclusion was based very largely—and, it is submitted, erroneously—upon the practice of raising points of law at nisi prius for consideration by the court *in banc*. This practice, which grew up in the eighteenth century unaided by statute, was of great importance to the working of the common law before the Judicature Acts, but it has never been adequately described. It is therefore the writer's purpose (1) to examine the proposition that a plaintiff could be nonsuited against his will, and (2) to give a short account of the development of this practice of reserving points of law at trial.

Nonsuit Against the Plaintiff's Will

The Court of Appeal drew three conclusions from its investigation of the practice at common law: first, that the plaintiff was entitled to a nonsuit as of right at any time up to verdict, and the court had no discretion to refuse; second, that, if before verdict the plaintiff refused to be nonsuited, the court apparently had power none the less to enter a nonsuit, once all the evidence had been taken or if the action was not sustainable in point of law; third, that after verdict [10] the court clearly had an unfettered discretion, if the verdict were against the plaintiff, either to nonsuit him or to give judgment for the defendant.[11]

[8] [1959] 2 Q.B. at p. 218.
[9] *Ibid.* at pp. 221–222.
[10] Or, where there was no jury, once the judge had found the facts. *Cf. Snelling* v. *Norton* (1595) Cro.Eliz. 409.
[11] [1959] 2 Q.B. at pp. 221–222.

The first proposition can be accepted unreservedly. A nonsuit was simply a declaration that the plaintiff had made default in appearing at a time when he was demandable, his failure to prosecute his writ leading to judgment that the defendant go without a day and the plaintiff be in mercy for a false claim. The importance of a nonsuit lay in the fact that the judgment did not rest upon a verdict and therefore did not, in most cases, bar a subsequent action.[12] At common law the default might occur at any time before verdict, and sometimes, indeed, even after verdict, but before final judgment.[13]

The default was a bodily one and it was early recognised to be within the power of the plaintiff: in other words, he was not merely demandable, but must be demanded. Thus in 1313, when a woman sued the Abbot of Fountains, he "went out to imparl and returned to the bar with his champion, and the lady saw that he intended to claim trial by battle, and by the advice of Toudeby she left the bar."[14] And in 1318, "while the inquest was out, the plaintiff, because he had heard that the inquest was going to pass against him, withdrew from the bar; and when the inquest came back, he was called and did not come."[15]

That the default was essentially physical seems clear from, for example, the fact that to the very end the record of a nonsuit included a statement that the plaintiff had been solemnly called and came not[16]; thus, too, it was disputed whether a plaintiff could be nonsuited on the same day that he had appeared or been seen in court,[17] and the king, who was deemed always to be present in his own courts, could not be nonsuited, even if he wished.[18] This being so, it would be surprising if a court could nonsuit a plaintiff against his will and despite his presence.

It is indisputable that plaintiffs were very frequently nonsuited at the instance of the court and not upon their own initiative. This might occur whenever the plaintiff's action could not be sustained in point of law, whether it be because he had no cause of action at all, had chosen the wrong writ, had pleaded badly, or had failed to adduce sufficient evidence. Examples of such "involuntary" nonsuits can be found in the earliest Year Books and reading between the lines we may perhaps guess that judges like Bereford C.J. on occasions rode roughshod over a plaintiff's wishes in this

[12] Com.Dig., Pleader (X.4.).
[13] Co.Lit. 139b.
[14] Y.B. 6 Edw. 2, S.S. vol. 43, p. 134.
[15] Y.B. 12 Edw. 2, S.S. vol. 65, p. 145.
[16] *Tidd's Practical Forms* (8th ed., (1840) p. 323.
[17] Vin.Abr., Nonsuit (D).
[18] *Ibid.* Nonsuit (C). A *nolle prosequi* was necessary.

matter.[19] Such nonsuits became increasingly important as the rules of pleading became more and more intimidating and rules of evidence developed; but it is, nevertheless, very doubtful, at least in later times, whether the court could nonsuit a plaintiff who remained steadfast.[20] The Court of Appeal concluded that it could do so, but, it should be noted, *only when all the evidence on both sides had been taken.*[21] Now at this stage the question would rarely arise. In a clear case the plaintiff would hardly refuse his consent, for a nonsuit was preferable to the alternative, which was a verdict for the defendant; and, anyhow, by then very little time would be gained by a nonsuit, so that the court would have no reason to insist, for it would simply direct such a verdict and leave the plaintiff to his remedies. Moreover, as we shall see, the practice of reserving points of law provided a convenient way of avoiding such a clash.

It is respectfully submitted, however, that the Court of Appeal was wrong and that a plaintiff could not be nonsuited against his will even at that stage. The Court relied upon a statement in *Tidd's Practice* that in certain circumstances "the judge at Nisi Prius will nonsuit the plaintiff"[22]; but this passage must surely be read subject to his later, emphatic statement that "the plaintiff is in no case compellable to be nonsuited,"[23] which was not quoted. The Court also relied on *Davis* v. *Hardy*,[24] where the trial judge had nonsuited the plaintiff despite his insistence that the case should be left to the jury. The nonsuit was indeed upheld by the court *in banc* upon a motion for a new trial, and it must be admitted that this case does support the Court of Appeal's second proposition. But it should be noted that in *Davis* v. *Hardy* the court held that on the evidence the plaintiff *could not* win. This therefore left, as his only ground of complaint, the fact that the judge had nonsuited him instead of directing a verdict for the defendant![25] For this very reason a plaintiff was not likely to secure a new trial *solely* upon the ground that he had not consented to a nonsuit (at that stage), and thus it is difficult to find cases which do rebut this second proposition of the Court of Appeal—for a motion for a new trial was the *one* remedy available to a nonsuited plaintiff. Yet it is possible to find just such an instance in which a new trial was granted upon that

[19] See, *e.g.*, Y.B. 6 Edw. 2, S.S. vol. 43, pp. 91, 94–95, 120–121.
[20] *Macbeath* v. *Haldimand* (1786) 1 T.R. at p. 176; *Watkins* v. *Towers* (1788) 2 T.R. at p. 281.
[21] [1959] 2 Q.B. at pp. 221–222. It conceded that a nonsuit against the plaintiff's wishes at any earlier stage was inadmissible.
[22] *Tidd's Practice* (9th ed., 1828), vol. 2, p. 867.
[23] *Ibid.* at p. 869.
[24] (1827) 6 B. & C. 225.
[25] See Bayley J., *ibid.* at p. 231.

ground. In *Dewar* v. *Purday*,[26] the jury had been unable to agree after sixteen hours and the trial judge then acted upon his first impression and nonsuited the plaintiff without his consent. The court awarded a new trial without considering the grounds for the nonsuit. This case runs directly counter to *Davis* v. *Hardy*, but appears to accord more easily with the principle underlying nonsuit.

The case is particularly interesting because the defendant had applied for a nonsuit at the close of the plaintiff's case, and the trial judge, though allowing the cause to continue, had given the defendant leave to move to enter a nonsuit. This is in fact an example of the practice of reserving points of law at trial which is described below, and if the case had preceded the verdict such leave would have allowed the court *in banc* to place itself in the position of the trial judge at the time and enter a nonsuit if it thought fit. It was therefore tempting for the court first to say that the nonsuited plaintiff could be in no better position than if he had obtained a favourable verdict and then to proceed to consider the grounds for the nonsuit. It did not do so: *the whole practice of reserving points rested upon the consent, express or implied, of all parties*, as well as upon the leave of the judge; and the plaintiff's consent had been given on the understanding that (subject to the point reserved for the court) the case should proceed to verdict—which it had not done. The court therefore refrained from considering whether plaintiff had made out his case, and, having done so, it assumed as beyond argument that the nonsuit without the plaintiff's consent was indefensible.

But this case is fatal not only to the Court of Appeal's second proposition, but also to its third, namely, that *after* verdict the court's power to nonsuit was unfettered; for this conclusion was based entirely upon examples of the practice of reserving points at trial, and without any doubt that depended upon consent, as *Dewar* v. *Purday* so neatly shows.

The Reservation of Points of Law at Trial

It is customary to point to the equity system of rehearing which served as the model for the Court of Appeal and by way of contrast to emphasise the inadequacies of the Writ of Error and Bill of Exceptions at law.[27] But it is less commonly emphasised that the common law had of its own accord evolved a reasonably satisfactory system of "appeal" insofar as the decisions of a trial judge could be reviewed by a court of three or four judges sitting *in banc*. Four days of term had to elapse before judgment could be signed, and,

[26] (1835) 4 N. & M. 633.

[27] See, *e.g.*, Holdsworth, H.E.L., vol. 1, p. 643; Sir Raymond Evershed, *The Court of Appeal in England* (1950) pp. 5–6.

as is well known, during that time the unsuccessful party might move the court for a new trial, for a repleader or a *venire facias de novo*, in arrest of judgment, or for judgment *non obstante veredicto*. But the first three of these involved the expense of a new trial, the fourth was stultifying and the fifth was much narrower than it might seem.[28] There was, however, another way in which the case might come before the court *in banc*. This was the practice whereby a trial judge could by *consent of the parties* reserve points of law for the court by giving leave to move for a nonsuit or verdict. If, for example, it was suggested that the plaintiff had failed to make out his case, or an objection was taken to the admissibility of vital evidence or to a critical direction in the summing up, the judge would decide the point in such a way that the trial could continue and give leave to the dissatisfied party to move the court. It was then possible to dispose of the matter without the expense of a new trial, special verdict or special case. The principle underlying the practice was that "where the judge at Nisi Prius has thought fit to save a point; the court has been in the habit of considering itself in the situation of a judge, at the time of the objection raised."[29] It was thus an application of the principle that "the day at Nisi Prius and the day *in banc* is all one."[30] This practice was a most important factor in the later working of the circuit system, but it is in danger of becoming lost from sight; the only modern account which is at all adequate is contained in two speeches of Lord Blackburn,[31] and very little can be found even in the books of practice before 1875.[32]

We cannot be quite certain when the practice began. The difficulty lies in disentangling it from the kindred (and, indeed, parent) practice of taking a verdict subject to a special case.[33] Special case, like the new trial, goes back to the Restoration and for a hundred years was the only convenient way of bringing a case before the court from Nisi Prius.[34] A general verdict would be taken, but by agreement of the parties the trial judge could make a "rule of Nisi Prius" that the verdict should ultimately be entered in accordance with the opinion of the court *in banc* upon a

[28] See *Stephen on Pleading*, chap. 1.
[29] *Cox* v. *Kitchin* (1798) 1 B. & P. at p. 339, *per* Buller J.
[30] Bro.Abr., Assise, 32.
[31] Cited Thayer, *Evidence*, p. 241, n. 1. Holdsworth, H.E.L., vol. 1, pp. 282–283; but *cf.* vol. 9, pp. 277–278. Sutton, *Personal Actions*, pp. 129, 133. Elementary textbooks on the legal system appear to ignore the development.
[32] *Cf.* Tidd, *op. cit.* vol. 2, p. 900; *Stephen on Pleading*, 5th ed., p. 103. I am indebted to Professor H. A. Hollond, who first drew my attention to the absence of any account of this practice several years ago.
[33] Tidd, *op. cit.* vol. 2, p. 898.
[34] Apart, of course, from a motion for a new trial. Special verdicts were cumbersome.

written statement of the case drawn by the parties' counsel. Until the reign of George II the jury's verdict had always to be given for the plaintiff and in the event of the court's being against him a nonsuit would be substituted.[35] No doubt this was based upon the idea that thereby the court was not usurping the function of the jury, but merely doing what the trial judge might have done. Thereafter it was considered permissible to enter a verdict for the defendant, on the ground that the jury had assented to the whole proceeding.[36]

In theory it should be easy to distinguish special case from the later practice of reserving points by giving leave to move for a nonsuit or verdict: the latter required a rule nisi, *i.e.*, to show cause, and ended in the rule being discharged or made absolute, while a special case was merely set down for argument and ended in the delivery of the postea to the successful party.[37] In fact, in the eighteenth century it is far from easy to distinguish the two, for a special case might happen to come before the court on motion,[38] and the earlier reports are anyhow very careless of procedural points. The essential difference between the two procedures lay in the fact that the special case *had* to come before the court if the cause was to be concluded[39]; but where the trial judge merely reserved leave to a party to move the court, the cause would proceed normally and judgment could be signed in the succeeding term, unless the dissatisfied party made a motion within the first four days thereof.

The first move towards a simpler procedure than that of special case is to be found in the practice of some trial judges of making the case subject to *their own* further consideration: no doubt it was not necessary for counsel to draw up any written statements in such circumstances. Holt C.J. seems to have been quite fond of this procedure, which was particularly convenient for the chief justices hearing London or Middlesex cases, as they could adjourn them to their chambers in Serjeants' Inn.[40] But Lord Mansfield probably deserves the credit for starting the practice of reserving points of law for the court by giving leave to move. It is first found clearly in the 1760s, and its appearance does not seem to be due simply to the advent of better reports: the procedure was

[35] *Kemp's Case* (1745) Barnes 455; *Moyse* v. *Cocksedge* (1749) Barnes 459. *Cf.* Willes 636, and at pp. 192–193.

[36] *Mead* v. *Robinson* (1743?) Barnes 451.

[37] Tidd, *op. cit.* vol. 2, pp. 898–899; Sutton, *op. cit.* p. 134.

[38] See, *e.g.*, *Parsons* v. *Thompson* (1790) 1 H.Bl. 322.

[39] Stephen, *op. cit.* p. 102. *Cf. Chandler* v. *The Hundred of Sunning* (1749) Barnes 458.

[40] See, *e.g.*, *Norris* v. *Napper* (1704) 2 Ld.Raym. 1007; *Gravely* v. *Ford* (1705) 2 Ld.Raym. 1209; *Dale* v. *Lubbock* (1729) 1 Barn.K.B. 199; *Jury* v. *Glover* (1729) 1 Barn.K.B. 200.

specially noted as if it were novel.[41] As with special case, the jury's verdict was at first (it seems) given for the plaintiff and the defendant would be left to move for a nonsuit or (in appropriate cases[42]) a verdict, even if the trial judge inclined towards the defendant. By the end of the century, however, if the judge felt that the point of law should be decided in the defendant's favour, he would simply nonsuit the plaintiff and give him leave to move the court to enter a verdict in his favour.[43]

As has been stressed already, the practice depended on the consent of the parties; and, of course, the leave of the trial judge was also necessary. But these conditions do not seem to have acted as excessive brakes. From the beginning of the nineteenth century the practice becomes increasingly prominent in the reports, and, while there is no way of discovering in how many cases it was used, it is clear that it was found a most convenient way of securing the review of a trial.[44]

By way of postcript it may be noted that it was *not* part of the Judicature Commission's scheme to abolish the practice,[45] nor did the Judicature Acts, 1873–75, do so.[46] The procedure was simplified and the consent of the parties was no longer to be necessary, but basically the principle of review by the court *in banc*—in its new guise of divisional court—was retained. It only disappeared with the Appellate Jurisdiction Act, 1876, which transferred three more judges from the common law Divisions to the Court of Appeal and decreed that every action should, "so far as is practicable and convenient, be heard, determined, and disposed of before a single judge."[47] The old practice was swept away,

41 See *Baskerville* v. *Brown* (1761) 2 Burr. 1229; *Dally* v. *Smith* (1768) 4 Burr. 2148; *Saunderson* v. *Rowles* (1771) 4 Burr. 2064. *Cf. Dale* v. *Sollet* (1767) 4 Burr. 2133 (special case?). Tidd, *op. cit.* vol. 2, p. 900 (d) cites earlier cases, but these appear to be examples of special case. The new procedure may perhaps be traced back to the time of Holt C.J.; *Greene* v. *Crane* (1705) 2 Ld.Raym. 1101; *Lamine* v. *Dorrell* (1705) 2 Ld.Raym. 1216; *Lock* v. *Hayton*, Fort. 246; *Depaba* v. *Ludlow* (1720) 1 Comyns 360; but these may also be instances of special case; *cf. Buckmyr* v. *Darnall* (1704) 2 Ld.Raym. 1085.

42 As, for example, in ejectment, where a verdict did not bar a subsequent action.

43 See, *e.g.*, *Clay* v. *Willan* (1789) 1 H.Bl. 298; *Graff* v. *Greffuhle* (1807) 1 Camp.N.P. 89.

44 See *Wymer* v. *Page* (1814) 1 Stark. 9; J. Chitty, *Practice of the Law* (2nd ed., 1838), vol. 4, p. 915. By the time of the Judicature Acts, the great majority of "Nisi Prius cases" seem to have come to Westminster in this way. See, *e.g.*, the first volumes of the Law Reports, L.R. 1 Q.B. and L.R. 1 C.P.

45 The Judicature Commission, 1st Report, at p. 15; 1868–69 [4130] xxv.

46 Supreme Court of Judicature Act, 1873, s. 46; Supreme Court of Judicature Act, 1875, Sched. I, Ord. 36, r. 22, Ord. 40, r. 2.

47 ss. 15, 17; R.S.C., December 1876. *Cf. Yetts* v. *Foster* (1878) 3 C.P.D. 437 and compare R.S.C., 1883, Ord. 36, r. 39, Ord. 40, rr. 2–5, with the rules cited in note 46, *supra*.

not because it was inadequate, but because it was unnecessary—a single appeal to the Court of Appeal was sufficient. That court took rather longer to swallow up the motion for a new trial, and a last vestige of the common law procedure still survives insofar as an application for a new trial is not by way of rehearing.[48] But all the rest has gone down before the Chancery principle of rehearing. This principle has triumphed primarily because it was better suited for the review of cases heard by judges sitting without juries, which were a phenomenon to which the common law procedure had difficulty in adapting itself. It is the same difficulty which really underlies *Clack* v. *Arthur's Engineering Ltd.*

[48] See *Annual Practice*, 1960, note to Ord. 58, r. 2. Even this survival was much narrowed by the rule that a person dissatisfied with the findings of a judge sitting alone must appeal and should not move for a new trial. See *Potter* v. *Cotton* (1879) 5 Ex.D. 137.

BOOK REVIEWS

Dr. T. Ellis Lewis

This is the first occasion for many years that the *Cambridge Law Journal* is published with a member of the Faculty other than Dr. Ellis Lewis responsible for the Book Reviews.

Dr. Ellis Lewis's name first formally appeared in the 1938 issue as a Book Review Editor jointly with Dr. D. T. Oliver's, but in fact he had assisted Dr. Oliver in this office for a considerable time before that date, and his period of actual service should properly be regarded as extending over more than thirty years.

The Editorial Committee accepted with great regret a resignation which Dr. Ellis Lewis felt bound to tender last term owing to the increasing pressure of his work and wish to put upon record here their appreciation of his very long and valuable collaboration.

Law and Opinion in England in the Twentieth Century. Edited by Morris Ginsberg. [London: Stevens & Sons, Ltd. 1959. viii and 389 and (indices) 17 pp. £2 2s. net.]

Some of the criticisms of Dicey's *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* have been based on a misunderstanding of Dicey's use of "public opinion." For us it is the opinion which the man on the Clapham omnibus shares with the man in the Brighton Pullman. There was no such opinion until the railways, the penny post, popular education, and the halfpenny newspaper made it possible. Dicey's "opinion" was really what his cousin, Sir Leslie Stephen, called "thought." Dicey was born half a century too early to believe that "law" could be understood without reference to its social and intellectual background, and he had read widely. There was, however, no such guide to "opinion" in the nineteenth century as Leslie Stephen had provided for the eighteenth century. In 1913 Dicey called himself an "unrepentant Benthamite." He was not quite that, for one cannot imagine a genuine Benthamite opposing Home Rule, but he was undoubtedly a Whig. He therefore thought of "opinion" as having changed when the Whigs came into office in 1830 and as having changed again when Gladstone succeeded Palmerston. Strands of opinion other than "individualism" and "collectivism" he either forced artificially into this order of development or ignored. The result was a readable and coherent book based upon a clear "philosophy" of legal history. Its conclusions need not be taken very seriously: the book was what Dr. Kitson Clark once called a "good first attempt."

The scheme of the book under review was suggested by Dicey's book. "What we had in mind," says Professor Ginsberg, "was at once a continuation of that work to take account of the developments since it was written and a widening of it so as to explore not only the field of legal changes, but the wider aspects of public policy." This was done by getting seventeen authorities to give lectures at the London School of Economics, five on "Trends of Thought," eight on "Legal Developments" and four on "Trends of Social Policy."

They could not, however, follow Dicey's line, for we are all collectivists now and so there was no change to describe. Moreover each lecturer was given an hour in which to develop his subject, whether he needed thirty minutes or five hours (though somehow Professor Kahn-Freund got fifty pages into his hour while Mr. Justice Karminski got only ten). Professor Gower had to get nearly the whole of private law into his hour, while Sir David Cairns had a whole hour for that very small part of it which is concerned with monopolies and restrictive practices. Nor is it easy to explain the omissions. Has there been no significant law produced by electricity and the internal combustion engine? What

came out of the great disputes over Tariff Reform and Home Rule? Did the Nonconformist Conscience not succeed in making us sober by Act of Parliament? Stands local government where it did when the second half of Sir Charles Dilke's draft was put into law? Did the Fabians not break up the poor law after all? Did Kipling's lesser breeds never get any law? The twentieth century seems to have been dominated by the trade unions, for a quarter of the book is devoted to industrial relations, and two other lectures are devoted to the social services which began as trade union benefits. On the other hand the great literary movement which has so profoundly influenced the " opinion " of this generation is given one paragraph, which does not even mention Galsworthy or T. S. Eliot.

Accordingly the book is, unlike Dicey's, incoherent and unbalanced. It is, however, very readable. Nearly all the lectures are original and interesting, most are stimulating, and some are real contributions to scholarship. Professor Gower's lecture on " Business " is a *tour de force*. Mr. Griffith may be forgiven for not tracing the end of the conversion of land into a commodity, because this is one of the cases where Dicey, not being an economist, led his followers astray: but Mr. Griffith does make plain that land law is now part of administrative law (though not on Professor Robson's theory, which I hereby repudiate once more notwithstanding the footnote on p. 201). Professor Titmuss on " Health " stresses the importance of sectional, or professional, opinion on branches of the law—a point which Professor Gower also makes in a different connection.

The least satisfactory section of the book is the first, dealing with " Trends of Thought," because it does not deal with them. Professor Ginsberg does, but only the aspect covered by his title, " The Growth of Social Responsibility." The legacy of Philosophical Radicalism is now a *damnosa haereditas*, and therefore Mr. Plamenatz's lecture, though interesting, is irrelevant. For the rest we have three lectures on the major political parties. One cannot, however, get out " opinion " by discussing party attitudes, because politicians are not sources of opinion but middle-men, who catch the straws in the wind and make them into gold bricks. They convert " opinion " into " law," but they know only enough of either to get on with their job, which is party politics. Professor Burn had only an hour for a party which has four times changed direction in fifty years, and therefore he could do no more than explain why Conservative politicians have to be opportunists. Mr. McCallum, perhaps with malice aforethought, was given the title " The Liberal Outlook " and therefore spoke nostalgically of the Liberal past. Professor Cole said very little that he had not already said at much greater length in his books. It is odd that the London School of Economics should have to go to Oxford for an exposition of Fabian Socialism: is it not in private duty bound to give us the authoritative book on the subject? Since it seems to be changing

into something like Mr. McCallum's Liberalism, now is the time. In any case, the attitudes of the political parties over fifty years cannot adequately be put into three lectures, though Professor Burn and Mr. McCallum faced their difficulties manfully and produced interesting lectures.

What one expects from a series of lectures is nothing more than intellectual stimulus, and this the book does provide. Even the law student will find a good deal in it, for the law school of the London School of Economics has not been unaffected by the prevailing fashion, which seems to date from the twenties, for case law. In the main, however, the book deals with statute law with a little, though not much, of its ideological background. It is not a study of the relation between law and opinion in the twentieth century, but it is nevertheless an interesting and readable collection of essays.

W. Ivor Jennings.

The Development of International Law by the International Court. By Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A., Judge of the International Court of Justice; Bencher of Gray's Inn; Member of the Institute of International Law. [London: Stevens & Sons, Ltd. 1958. xix and 400 and (index) 8 pp. £3 3s. net.]

This book first appeared a quarter of a century ago, when it was entitled *The Development of International Law by the Permanent Court of International Justice*; meantime the Hague Court has ceased to be labelled "permanent" but has become more "international" in its scope.

In 1934 this book ran to about 100 pages. The development of international law since then, by the two Hague Courts, has been so remarkable that no less than 300 pages have been added to this edition. The manuscript of this edition "was almost complete" when, at the end of 1954, the author was elected to the court. He says: "I have come to the conclusion that notwithstanding that event, which imposes a clear obligation of restraint, I ought to proceed with the publication of this edition. . . . I have considered it proper not to comment upon or refer to any of the judgments or opinions given by the court since I became one of its members" (pp. xiii and xiv).

The book is still divided into an account of the law, of judicial caution, of judicial boldness in legislating, of the effectiveness of international law and of the relation between the Court and state sovereignty.

In Part I, Chapter I on Precedent will be found to be particularly useful; so will Chapter IV on Judicial Technique.

Part II, dealing with "Judicial Caution," leaves the reader with the feeling that there may have been too much of this in the past. The P.C.I.J. had for example, in the case of the *Railway Traffic*

between Lithuania and Poland, to construe article 23 (e) of the League Covenant. This provided that members might " make provisions to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members . . ." (p. 78). The Court timidly observed, " The present opinion is not to be construed as giving any view in regard to the opinion expressed . . . to the effect that by the terms of article 23 (e) ' the members of the League have certainly the right to request any members at least to refrain from acting in opposition to the objects of this article.' "

This sort of hesitancy on the part of the old P.C.I.J. may well have been due to the survival of a " voluntarist " view of international law dependent upon the consent of states, rather than a conception of it as a system of legal order superior to states and binding upon them as members of the international community.

Concessions to national sovereignty were made by the P.C.I.J. in the *Panevezys-Saldutiskis Case*, when the Court, in a dispute with Lithuania, said that a state alone could pronounce a final decision on the matter of " local remedies," (p. 101) and that it required clear proof that the Lithuanian courts had no jurisdiction before accepting a submission that the rule requiring the exhaustion of local remedies had been complied with. Lauterpacht seems to be in favour of a view which would enable the international tribunal to judge such matters for itself: as a judge of the I.C.J. he has recently pleaded for a bold attitude on matters of jurisdiction. In a strong dissenting opinion in the *Interhandel Case* (judgment of March 21, 1959, *I.C.J. Reports*, 1959, p. 100) he recently said:

> " A Judgment of the Court, based on the fact of non-exhaustion of local remedies, implies the assurance to the applicant state that, once it has done its best to exhaust local remedies, the Court will proceed to the adjudication of the dispute on the merits—unhampered by any other objections to its jurisdiction. There would otherwise be no point in requiring the injured party to exhaust local remedies—only, once it had done so, to see its claim defeated on account of some other preliminary objection. It is largely for that reason that according to the established practice of the Court preliminary objections must be examined—and rejected—before the plea of admissibility is examined. If this is so, then the very decision of the Court declaring the application to be non-admissible on account of non-exhaustion of local remedies calls for—it implies—a previous decision as to the validity of the automatic reservation and of the manner in which it has been invoked."

Lauterpacht was equally bold, in the same case, when in dealing with the form of " acceptance " of the optional clause giving jurisdiction to the Court he observed:

> "It is impossible for the Court to attach importance to the argument that as governments are free to accept or not to accept the obligations of the Optional Clause of Article 36 of the Statute, they are free to do so subject to reservations of their unlimited free choice. A person or a state may be free to join an association or to accede to a treaty. This does not mean that they are entitled to join or accede on their own terms in disregard of the rules of the association or of the provisions of the treaty. Governments possess no unlimited right to make reservations. In the Advisory Opinion on the *Reservations to the Genocide Convention* the Court rejected the contention that the unanimous consent of all parties to the treaty is necessary to enable the state to become a party to the treaty subject to a reservation. But the Court equally declined to accept the view that the right to append reservations is unlimited. On the contrary, it made 'the compatibility of a reservation with the object and purpose of the Convention' the decisive test of their admissibility (*I.C.J. Reports*, 1951, p. 24). It said: 'The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them' (at p. 24). It is for that reason that while most of the recent conventions allow reservations to their articles, they expressly exclude them with regard to some of the essential articles of the Convention. Of that practice, the Conventions of 1958 relating to the law of the sea provide an instructive example. This applies also to conventions regulating subjects of limited scope such as the Convention of July 28, 1951, relating to the Status of Refugees (Article 42 of the Convention)." (*Interhandel Case* judgment of March 21, 1959: *I.C.J. Reports*, 1959, p. 105.)

Lauterpacht is also in favour of leaving the court free to refer to *travaux préparatoires* in its judgments (p. 132). And one cannot but agree with him when he suggests that the judgment of the I.C.J. in the *Asylum Case* made "caution border on indecision" (p. 148). The same statement could perhaps be made of the opinion on "*The conditions of Admission of a State to Membership of the U.N.*" (See p. 149.)

Lest, however, it be thought that the courts have never been bold Part III gives instances of "judicial legislation." The court excluded parties to a dispute from the unanimity rule under the League Covenant (p. 160). The "legislation" in the *Fisheries Case* by the I.C.J. (Lord McNair dissenting) may have been less happy (p. 191). The assumption by the I.C.J. in the *Corfu Channel Case* was more commendable; as Lauterpacht observes (p. 203) "Jurisdiction to find on the question of compensation implied also jurisdiction to determine the amount of compensation." It certainly should. The *Reparations Case* enabled the United

Nations to take an advisory opinion on the legal position arising from the assassination of the United Nations' representative, Count Bernadotte (pp. 176 and 275), in what was then a non-member state.

In the matter of effectiveness (Part IV) the Hague Court was helpful in making the work of the I.L.O effective (p. 268), and in avoiding too extensive an interpretation of the exception of "domestic jurisdiction," recognised under the League of Nations and the United Nations Charter (pp. 267 and 272). In Part V Lauterpacht has some interesting things to say on the relation of the jurisdiction of the Court to state sovereignty. In the *Reparations Case*, the Court dealt with the obligations of non-member states (p. 311). The Court has also stressed the primacy of international law over sovereign changes of mind (p. 315, note 5, in particular) and the duty of restitution or, failing that, of paying full compensation for property seized (p. 316). However, it is clear from the *Monetary Gold Case, I.C.J. Reports*, 1954, that the court will not assume jurisdiction when the state concerned in a dispute has not consented to the jurisdiction. It is unfortunate, of course, that the failure to assume jurisdiction in this case meant a refusal to adjudge that gold in the Allies' possession might belong to Albania, so that the Allies could be "at liberty to hand it over to the United Kingdom . . . either by way of execution of a valid judgment of the Court, given in the *Corfu Channel Case*, or, in the case of the United Kingdom, by way of self-help in a form not prohibited by the Charter of the United Nations and aiming at giving effect to a previous Judgment of the Court" (p. 344). It is difficult, indeed, to see why Albania's refusal to join issue should affect proceedings to enforce a judgment over property not in Albania's possession. A little boldness here might have righted the undoubted wrong done by Albania's failure to comply with the judgment against her in the *Corfu Case*. Lauterpacht observes "in so far as sovereignty is, inaccurately, identified with the traditional legal right of states to be judges in their own cause, submission to the Court does imply a surrender of sovereignty" (p. 394).

There is some inevitable repetition in this book but it is certainly thought provoking. It will be even more stimulating when the results of the last five years of the court's deliberations, with Judge Lauterpacht on the Bench, can be included. Since the first edition, in 1934, Lauterpacht has been knighted, become a Bencher of his Inn, a Queen's Counsel, a member of the Institute of International Law, Whewell Professor at Cambridge and a Judge of the International Court itself. He bids well to become one of the most learned and distinguished ornaments of that Court.

This book is therefore of special interest, since it combines the sound vision of the young teacher at the London School of Economics with the judgment of the mature scholar who has been constant in his ideals.

B. A. Wortley.

The Cy-Près Doctrine. By L. A. SHERIDAN, LL.B., PH.D., Professor of Law in the University of Malaya, and V. T. H. DELANY, M.A., LL.D., Lecturer in Law in the Queen's University of Belfast. [London: Sweet & Maxwell, Ltd. 1959. xxxvi, 160 and (index) 6 pp. £2 10s. net.]

THIS, the first British book devoted entirely to the *cy-près* doctrine of the law of charities, is an event of some importance. It is likely to lead, for instance, to some modification of the treatment accorded to this doctrine in students' textbooks upon the general principles of Equity or of Trusts. And, of course, if the Government's Charities Bill of 1960 becomes law, that is likely to compel alterations, too—both in those books and in this one.

The first chapter discusses the origins of the doctrine, the meaning of the term *cy-près*—now commonly used in the sense of "as near as possible," and the early misunderstandings which formerly caused some of the United States to hold that the doctrine was wholly inapplicable to them (see pp. 24–28, 63–65, 67).

The second chapter ("Basic Principles") begins by distinguishing between (i) cases in which the Crown or the court prescribes the mode of applying a charitable gift because the donor failed to state —or to state in sufficient detail—precisely what is to be done and (ii) cases of so-called "impossibility," under which the authors include cases of mere impracticability (as where a subsidiary provision is deleted because it might defeat the donor's main purpose) and even, see pp. 115–116, cases in which a surplus remains after the donor's specified purposes have been accomplished. So we approach the underlying theme, of which the Preface (curiously augmenting the Table of Contents) has given us constructive notice, that "*cy-près* occasions" arise either (i) from the lack of an adequate plan or mode (see further Chapter 3) or (ii) because although the donor did supply a detailed plan or mode some or all of it is or becomes "impossible" in one or other of the three senses above (see further Chapters 4–7).

The remaining twenty pages of Chapter 2 are concerned with "impossibility"—[so says p. 31, yet they include the authors' treatment and *critique* of the Nathan Report and their own proposals for reform, *e.g.*, that the Crown should lose its *cy-près* powers and that *cy-près* jurisdiction should extend to invalid gifts for "charitable or benevolent" purposes]. Where there is "impossibility" the court will intervene if it can find a general charitable intention, *i.e.*, a charitable intention wider, even if only a little wider, than the donor's specified plan. Moreover, according to some authorities, the court likewise intervenes if the gift is "out-and-out"—which the authors define somewhat ambiguously as a disposition which clearly involves no expectation that the donor will ever get the property back, "in other words a gift in pursuance

of an intention to part with the whole interest in the property" (p. 37).

Chapter 3 ("General Charitable Gifts") gives the detailed exposition of (i) above, *i.e.*, the cases in which a donor has made a charitable gift without attaching to it an adequate plan or "mode" of applying it: perhaps he prescribed no definite plan or tried ambiguously to identify one of several similar charitable institutions, or perhaps he entrusted the planning to nominees who for some reason or other fail to do it. In such cases, if there is a general charitable intent (as above defined) the court will make or complete the plan (the "scheme") for him or, instead, will sometimes invite the Crown to exercise what remains of its ancient prerogative power. That prerogative power, however, if we ignore the so-called "public policy" principle of the old "superstitious uses" (now generally thought to be obsolete) and possibly the rule in *Re Slevin*, below, seems nowadays to apply only where the donor purported to make his gift *direct* to charity without attempting to vest it in any trustees: presumably Lord Eldon reached this conclusion because he felt that the exclusive jurisdiction which the Court of Chancery had acquired over trustees operated logically to restrict, *pro tanto*, the Crown's ancient parental powers—exercised by the Chancellor as keeper of the royal conscience.

At this point your reviewer ventures to question the propriety of p. 71, where *Re Slevin* (1891), which after all was a unanimous decision of the Court of Appeal, gets its first knock, under the subtitle "gift to a defunct [*sic*] charity." It suffers again later (pp. 112–114), *s.t.* "Moribund [*sic*] Institutions"—a phrase which seems to ignore that part of the judgment which held that the length of time by which an unpaid charity outlives the testator is irrelevant. The book's tendency to "play down" *Re Slevin* is probably due to the unimportant point that it supported Crown *cy-près*. But surely there is nothing so very strange in holding that, when a charity dies, its remaining property (at any rate such as has been given to it *direct* and out-and-out—see Lindley and Kay L.JJ., at p. 237) "falls to be administered by the Crown, who will apply it, according to custom, for some analogous purposes of charity" (*ibid.* at p. 243). Whether the Crown's intervention here stems direct from its parental powers or, as the authors assume in an unhappy argument on p. 113, is an unprincipled extension of the words *bona vacantia*, matters little. The strange thing, surely, is that that kind of case has so often been confused with those cases in which a legacy for a specific charity has lapsed because the charity-legatee died before the testator and so never became entitled at all: in those cases the court ordinarily has *cy-près* jurisdiction but demands (p. 108) a general charitable intent; see *Re Rymer* (1895)—a legacy by way of trust.

Chapter 4 ("Initial Impossibility") states at the outset that it concerns charitable gifts "other than gifts purporting to be to

specified charitable institutions "—those are to be dealt with later (in Chapter 6, *s.t.* "Specified Institutions"). Its second section, entitled "where there is no general charitable intent," begins with a clear hint that the authors belong to the out-and-out school; but it then curiously proceeds, first to three nineteenth-century cases on attempted gifts to specified charitable institutions (in two of which the same judge "strayed from orthodoxy" and said that the Crown's prerogative applies whenever such a legacy fails), and then to one upon the old illegal "superstitious uses" which shows (as was stated in previous chapters) that, for them, the prerogative was exercised without regard to the donor's intent—*cf.* p. 85 which seems to say that court *cy-près* applies. Then come five pages on out-and-out as a possible alternative to general charitable intent. They are devoted entirely to quoting and assessing two recent cases in the Court of Appeal, in each of which funds had been subscribed (some anonymously and some by known donors) to the building of a new hospital, and in each of which the project eventually became impracticable—in one case because the National Health Act intervened (*Re Hillier*, 1954) and in the other because the response was insufficient (*Re Ulverstone*, 1956). In each the only question was whether the contributions made by the *known* donors were returnable, but the court considered *inter alia* whether the fact that such donors knew that their donations would be intermingled with anonymous donations implied that they intended their own donations to be non-returnable.

In *Re Hillier*, Evershed M.R. found a general charitable intention and said also that the anonymous donations were a relevant factor since the other evidence was equivocal; Denning L.J. relied on a supposed presumption in favour of charity; but Romer L.J. (dissenting) thought the fact of anonymous donations irrelevant and held that the known donors should be repaid. In *Re Ulverstone*, however, there was a unanimous decision that, in spite of the anonymous gifts, no general charitable intention was shown and that accordingly the known donors were entitled to repayment [resulting trust]. In each case, of course, there were incidental *dicta* about the anonymous unidentifiable subscribers; but whereas in *Re Hillier* (see at p. 711) counsel had conceded that they gave out-and-out, in *Re Ulverstone* the leading judgment said (at p. 633) that an anonymous donor, who was able to prove that he had contributed, should surely be repaid if his donation was made and solicited solely for a purpose which wholly failed. In the result therefore, despite the authors' assertions and summary (pp. 82, 85), these two cases—of which your reviewer has ventured above to offer his own summary of the relevant facts and judgments—hardly support out-and-out as sufficient in itself to justify a *cy-près* order, though Denning L.J.'s brief but characteristic judgment (in *Hillier*) seemingly took that line.

Towards the end of Chapter 5 ("Supervening Impossibility")

these two Court of Appeal decisions are criticised for having treated their facts as producing initial, rather than supervening, impossibility. But when one reads the judgments it seems that this question, if indeed it arose, was regarded as irrelevant: the contrast intended, I think (*e.g.*, in *Re Ulverstone*, at pp. 635–637), was between (i) charitable projects which become impossible after the donation is made but before the project (the new hospital) has materialised, and (ii) those cases (like the *Welsh Hospital Case*, 1921) in which a surplus remains after the charitable purpose has been completely achieved and so has ended; for the rare donor who has such contingencies in mind is more likely to expect his money back if his charitable purpose cannot be achieved at all. The authors describe an impossibility as *initial* if at the date of the gift the prescribed charitable purpose "cannot ever take effect" (pp. 74, 99—but *cf.* p. 102), and as *supervening* if the charitable disposition "has been in operation for some time" (p. 94). The importance of that distinction, we are told (p. 102), is that with *supervening* impossibility (a) a general charitable intent is easier to prove, and (b) there is "overwhelming authority" that, irrespective of any such general intent, out-an-out suffices.

It would seem, from the text, that in England this "overwhelming authority" is chiefly *Re Peel's Release* (1921) and *Re British School of Egyptian Archaeology* (1954), each decided at first instance and each a trust created *inter vivos* for a purpose which eventually became impracticable; for other cases such as those of the *Welsh Hospital Fund* (1921) and the *North Devon Relief Fund* (1953), which were cases of surplus after the charitable project had been completely fulfilled, have used out-and-out simply as evidence of general charitable intent. In the above *Egyptian Archaeology* case, however, Harman J. said clearly (in a passage which the book quotes, p. 98) that out-and-out gifts do not necessarily imply a general charitable intent but, being in the circumstances inconsistent with any right (in contract or by way of resulting trust) to get the gift back, are applicable *cy-près*. On the other hand, it should be noted that his lordship evidently conceived himself to be applying, or perhaps extending, something very like the principle of *Re Slevin* (1891) which he cited (at p. 552) as showing that, in gifts to charity by will, "once the testator is dead, his money is devoted to charity [*sc.* for ever] . . . and that it makes no difference if the charity is afterwards dissolved." So it seems that his lordship interprets *Re Slevin* as authority that legacies to charity, showing no contrary intention, are presumed to be out-and-out and therefore are applicable *cy-près* if the charity subsequently fails. Herein, moreover, he was joined a few days later by a decision of the Court of Appeal (Denning and Romer L.JJ.) in *Re Wright* (1954, at p. 362):— "Once money is effectually dedicated [*sc.* by will] to charity [whether to an existing charitable institution or for a specified charitable purpose] . . . the testator's next of kin or

residuary legatees are for ever excluded." Likewise in *Re Tacon* (1958, at p. 453), Evershed M.R., citing *Re Slevin*, stated this as the "well established" rule even for cases in which the will shows no general charitable intention. And, because this is the rule, both *Re Wright* and *Re Tacon* held that the right of residuary legatees or next of kin to have an inquiry as to whether the testator's charitable purpose is practicable is only (even though the legacy and the purpose are *in futuro*) a right to know whether it seemed practicable *at the date of the testator's death*. The book appears to overlook entirely this significant aspect of the decisions: see also the disappointing final paragraph of Chapter 5.

The crucial problem, surely, is that which faced Harman J. in *Re British School of Egyptian Archaeology*. He evidently wished to follow *Re Slevin;* but, after stating its principle as above, he hesitated, because it concerned a gift by will—whereas his case concerned gifts *inter vivos*: so he managed to reach the same conclusion by deciding that his case was "more in line with" the surplus cases, in which gifts *inter vivos* had been held not returnable, than with certain cases of supervening impossibility which had held the contrary. The crucial problem, then, is whether the Court of Appeal or House of Lords will ultimately do what Harman J. hesitated to do, namely, decide that, even with gifts *inter vivos*, one who makes a charitable gift without making any apparent reservations is "for ever excluded"—unless the gift was impossible *ab initio* and lacked a general charitable intent. Meanwhile, presumably, we must regard the sweeping principle of *Re Slevin* (there stated as though of general application) as perhaps applicable only to *testamentary* charitable gifts, and, like Harman J., must tread more circumspectly when dealing with charitable gifts *inter vivos*.

Your reviewer is uncomfortably aware that he has already exceeded his allotted space and probably, by venturing to assert theories of his own, has exceeded also his proper function. It remains to add that Chapter 7 ("Surplus") covers its topic adequately and that the three final chapters, other than the eight concluding pages ("the direction of schemes"), do not add much to what has gone before. The book as a whole has good qualities—*e.g.*, it contains comparisons between our law and that of other jurisdictions, and the numerous cases listed in its footnotes include many Commonwealth cases and some from the United States. Yet here and there it is disappointing and gives an impression that it may have been constructed and written rather too hurriedly. Its next edition, one suspects, will be a better book: even this one, however, is a considerable achievement.

S. J. Bailey.

Social Change in the Law of Trusts. By G. W. KEETON, M.A., LL.D., Professor of English Law and Head of the Department of Laws, University College, London. [London: Sir Isaac Pitman & Sons, Ltd. 1958. vii and 117 and (Table of Cases and Index) 6 pp. 25s. net.]

THIS book is "in substance a collection of essays which have appeared since 1945 in various legal periodicals." Each of its nine chapters deals with some topic affecting the law of trusts, though the perpetuity rule (Chap. III) and Peter Thellusson's Will (Chap. IV) are more commonly regarded as belonging to the general law of property. The Preface indicates that the essays here reproduced "were intended to explain some of the problems created in the Law of Trusts by the social changes upon which the country has embarked."

In Chapter I (The Selection of Trustees) the relevant social changes are evidently the gradual disappearance of a leisured class —landowners and retired business men—willing to undertake trusteeship, and the rise of trust corporations such as banks and insurance companies at the expense of the Public Trustee—citing the 1956 report on the Public Trustee Office. In Chapter II (Trustee Investments) the social changes are chiefly increasing costs of administration, inflation, and unpredictable changes in rates of taxation and death duty; and there is criticism of Parliament's failure (at the time of writing) to widen investment powers as recommended by the Nathan Report in 1952. Presumably similar social changes were in mind in Chapter V (Remoulding Beneficial Interests), which concludes with a reference to the 1957 report of the Law Reform Committee and its "frank recognition" that changing social circumstances had made a change in the law "inevitable." In Chapter VII (The Charity Muddle), the "social policy" of the charity decisions is difficult to discover, but the judges are now more conscious of the element of social benefit—*i.e.*, are prescribing that the trust must be beneficial to the community; and it is suggested (p. 95) that the House of Lords should periodically announce some of the general principles upon which their charity decisions are founded. Chapter VIII (The Nathan Report and Charities) remarks that "the reasons for the establishment of the Nathan Committee were social rather than legal ones" (p. 97) and that "the overriding purpose" of the report was to study the law "from the standpoint of its social purpose and to demonstrate the continuing need for voluntary action in the welfare state" (p. 98).

The four remaining chapters, dealing respectively with the Perpetuity Rule, Peter Thellusson's Will, The Director as Trustee, and the tracing and *in personam* claims in *Diplock's* case, do not refer specifically, I think, to any elements of social change. The curious *Baker* v. *Medway* case [1958] 1 W.L.R. 1216, with its

striking illustration of the *Diplock* innovation, was not reported in time to be mentioned here.

The book is evidently intended for lawyers or law students: primarily, perhaps, for those of us who are devotees of the author's *Law of Trusts*. Here and there, for instance, one may find in it some stimulating aside; or some interesting half-forgotten fact in the complex story of the Thellusson or the Diplock will; or some slight historical excursion about directors, investment powers, and the perpetuity rule—with mention here of Mr. Yale's volume on Lord Nottingham's Cases. There is, however, no table of statutes; nor are page references supplied when passages are quoted from judgments. Indeed, at least one chapter seems to have been written for an audience ("It is no part of the purpose of this lecture . . ." etc., p. 70) rather than for a reader. And this accounts perhaps for one's impression that the more difficult aspects of a topic are not infrequently avoided, and that the audience or reader is sometimes expected to know more than Dr. Keeton has time to tell —*e.g.*, the sentences (pp. 5, 26) which begin with the words "of course."

None of these comments is intended to be derogatory. To provide for lawyers and law students a brief and comparatively simple account of certain aspects of a subject so rigorous as the law of trusts, describing how the law changes or ought to change in order to meet modern times, is a task which mature experts of Dr. Keeton's stature too seldom undertake; and if, as with the *Diplock* decisions, he has the skill to enable us to "see the wood from the trees" without dragging us through a mire of legal technicality, he does a considerable service. And, after all, we know full well that our textbooks, supplemented by statute and law report, will tell us more.

S. J. Bailey.

Cases on Equity and Trusts. By G. W. Keeton, M.A., LL.D., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London. [London: Sir Isaac Pitman & Sons, Ltd. 1959. xxv and 284 pp. 50s. net.]

This new casebook is intended primarily as a companion both to the author's *Introduction to Equity* and to his *Law of Trusts*. Accordingly, it begins with forty-two leading cases (137 pp.) to illustrate various principles of equity and then concludes with fifty-two cases (144 pp.) upon the law of trusts. Thus, an average of three pages is devoted to each case, including a concise summary of its material facts followed by the whole or the significant part of a judgment, or sometimes, by passages from several judgments.

Leading cases upon general equitable principles naturally include a fair number of elderly decisions: thirty of the forty-two given here are older than the year 1900 and fifteen of them are older than

the year 1800. To ten of the forty-two the author has added some kind of modernising note (ranging, from a few lines, to a page and a half for *Penn* v. *Baltimore* and *Hurst* v. *Picture Theatres*), mentioning later decisions, sometimes with a quotation, or indicating leading articles or passages in his textbooks where more may be found. The fifty-two chosen for the law of trusts, however, are more modern—more than half are post-1900 and only seven are pre-1800: and no supplementary notes are added to any of them. The book contains no subject-index and no table of statutes; but each leading case bears a brief title (listed with it likewise in the table of contents) which is usually fairly informative: *e.g.*, for *Re Chardon*, "A gift to a cemetery company and the rule against perpetuities." [Contrast, however, the title given to the *High Trees* case—"The relation of law to equity since the Judicature Acts, 1873–75: an agreement to accept a lesser sum under deed."] There is a full table of cases, including some 300 to which the judges referred in the passages which the book quotes from the judgments of its leading cases.

Dr. Keeton's successful endeavours to simplify the facts of his cases are one of the undoubted qualities of this collection. Another is his achievement in providing so much useful case-material in so slim a volume. The format of the book is clear and pleasant to the eye. One feels some slight surprise perhaps at the inclusion here—as in his essays on *Social Change in the Law of Trusts*, reviewed *ante*—of the *Duke of Norfolk's* case and the *Thellusson* case. But none of us will question the appropriateness here, as in the essays, of the *Diplock* tracing and *in personam* claims: his method for them is first to summarise the Court of Appeal on tracing proper (this book, like the essays, gives the Court of Appeal hearing no name or reference), and then to quote from Court of Appeal and from House of Lords on the *in personam* aspect of the case: on these austere problems, bedevilled by exceptionally lengthy judgments, this casebook and the essays may profitably be read together. Nor, of course, could one question the appropriateness of including *Chapman* v. *Chapman*, though in this casebook (whose Preface, though not its publication date in 1959, is dated a little earlier than the essays) there is no mention of the resulting report, in 1957, of the Law Reform Committee nor of the Act of 1958 which followed: so here again, I think, the essays and this casebook can help one another. On the other hand, one can realise something of the severity of Dr. Keeton's task and of the skill with which he tackled it when one observes that his tracing cases (*Diplock*, with *Hallett* its predecessor) and the *Chapman* case, which together occupy 230 pages of the Law Reports, are covered here—with adequate quotation—in less than thirteen pages.

In compiling a casebook, there is naturally the difficulty not only of abbreviating the cases so that they nevertheless speak for themselves but also of deciding what cases one should select. Dr.

Keeton, we may be sure, devoted much time to this latter problem; and your reviewer would hesitate to offer comments upon his choice. Those of us who study equity and, in particular, the law of trusts will surely welcome this gallant collection. It will save us much searching in the old and the more recent law reports. But one must not expect many from the past decade: we are given only a dozen or so of them, apart from the half a dozen more that are merely cited by one or other of the formers' quoted judgments. It might be helpful in the next edition, unless any such expansion would seriously increase the selling price, to add to some more of the leading cases a few lines indicating for each important topic one or two articles or recent decisions which have developed it further. But, even as it stands, this is a book for which we are sincerely grateful.

S. J. Bailey.

Studies in the Roman Law of Sale. Dedicated to the Memory of Francis de Zulueta. Edited by David Daube. [Oxford: Clarendon Press. 1959. xi and 180 and (indices of texts and cases) 15 pp. 25s. net.]

It was intended that this collection of studies in the Roman law of sale should be published in celebration of the eightieth birthday of Francis de Zulueta. He died shortly before that milestone was reached and the birthday present has become a memorial tribute, but the editor discloses that de Zulueta knew of the project and saw part of the text in typescript and we may be sure that he approved, and he would not wish for a better memorial.

De Zulueta's writing covered many aspects of Roman law, but he is especially thought of in connection with the Roman law of sale, partly by reason of his book on that subject published in 1945 but even more because successive generations of Oxford men remember how his teaching enriched their studies of the titles *De contrahenda emptione* and *De actionibus empti venditi* which were prescribed texts for examination. The subject of these essays is therefore particularly appropriate and, it may be added, particularly useful. Sale is the great commercial contract and, as de Zulueta noted, it is the most fruitful subject in Roman law for the English law student, since it not only supplies some knowledge of the basis of the law of sale in Continental systems but also yields material for a critical appreciation of our own Sale of Goods Act.

As soon as one gets past an elementary study of Roman law the difficulty of the corrupt text rears its uncouth head, and there is to be found in these essays plenty of probing of suspect passages. Careless copying by scribes, or intelligent or unintelligent revision by post-classical lawyers, or the placing of an incorrupt text out of its context—any one or more of these may be the cause of some

modern scholar's perplexity. But it is possible to become too suspicious and blame every difficulty on a defective text forgetting that even the best writers may at times be allusive, ambiguous or downright obscure. Statutory interpretation in the twentieth century would be much easier if we were permitted to recast the text of the statute on the footing that what seemed to be the obscurities of the draftsman were most probably the Tribonianisms of the Queen's Printer.

However, something has certainly gone wrong with D.18.1.40, and although Professor Duff in his essay clearly betters Mackintosh's facile explanation the result is still hardly satisfying. Land has been sold on the terms that the purchaser is to measure and report within thirty days, otherwise the vendor is not liable for any shortage. The purchaser measures within the time, reports a deficiency and collects a rebate. Much later the purchaser has occasion to measure again and discovers a greater shortage than he believed. Has he a further claim? Paul tells us that it depends on the exact wording of the term. At that point the text becomes corrupt, and the corruption must be greater than was supposed by Mackintosh, Mommsen or Duff. Mackintosh, misled by what appears to be the accidental omission of *triginta* in one place, thinks that the contrast is between an obligation to measure and report "within thirty days" and "within the next few days," and then proceeds to interpret "within the next few days" as "possibly many years hence." Mommsen seems to indicate a solution that (*pace* Paul) does not depend on the exact wording of the term. Duff's solution supposes a distinction between reporting *quanto modus agri minor sit* and reporting *de modo agri*, but he undermines his own position by admitting that the two phrases are normally equivalent, and in any event the solution remains irrational.

Interpolations, real or imaginary, are not the only difficulties presented by the texts. It is often not easy to decide whether we are dealing with a real problem or a student's trick question. Such is the well-known conundrum of Gaius about the contract for the provision of gladiators on the terms that so much was to be paid for those who emerged unscathed and a different figure for those who were killed or maimed, which is carefully examined by A. M. Prichard. Nor must we omit the case where a problem is complicated, or at least rendered suspect, by the perverse and incomprehensible behaviour of one of the parties, as in the case of the purchaser of wine *exceptis acidis et mucidis* who insists on taking delivery of *vina* proved to be *acida*.

Lest anyone should think that the essays in this volume are concerned only with textual problems of classical law, attention should be drawn to Dias' discussion of the development of *laesio enormis* in Roman-Dutch law, Rogerson's comparison of liability for latent defects in Roman and English law, and Professor Powell's

comparison of eviction in Roman and English law. Of course in such a collection as this there is bound to be some overlapping: Honoré's essay on the history of the Aedilitian actions from Roman to Roman-Dutch law covers some of the same ground as Powell has done and Professor J. A. C. Thomas and D. E. C. Yale both address themselves to the difficulties raised by Celsus' text in D.12.4.16. But overlapping is not the same as duplication. Every one of these essays makes its individual contribution to the worth of the collection and the collection as a whole is a witness to the virile state of Roman law studies in the United Kingdom and a worthy tribute to a great man's memory.

In a work of this kind the task of the editor is of a rather limited scope, but Professor Daube is to be congratulated as much on the volume as a whole as on his own valuable contribution in the essay on certainty of price.

F. H. Newark.

A Casebook on Contract. By J. C. Smith, m.a., ll.b., of Lincoln's Inn, Barrister-at-Law, Head of the Law Department, University of Nottingham, and J. A. C. Thomas, m.a., ll.b., of Gray's Inn, Barrister-at-Law, Douglas Professor of Civil Law, University of Glasgow. [London: Sweet & Maxwell, Ltd. 1957. xxii and 477 pp. £2 5s. net.]

This book represents the first attempt to provide a source for "case method teaching" in the law of contract. In it students experiencing that and other forms of teaching will find material of the highest value both for their interest and instruction. Side by side with the leading cases already met in textbooks they will find summarised accounts of, or quotations from, less important decisions, Commonwealth and American decisions, notes and articles from journals, relevant sections of statutes and statutory instruments, factual problems and theoretical questions posed by the authors. The inclusion of overseas cases is an admirable experiment, although an unduly truncated account could sometimes mislead the student (as on p. 111). Some which might be expected are omitted (*e.g.*, the useful judgment of Latham C.J. on frustration in *Scanlan's New Neon, Ltd.* v. *Tooheys, Ltd.* (1943) 67 C.L.R. 169). Similarly, the authors have arranged the topics in an order not wholly traditional, excluded certain topics altogether, and cut down others to a bare minimum. The last two features must necessarily reduce the value of the book for a course on the law of contract as a whole. There is no material on Agency, Quasi-Contract or Illegality, and far too little on Damages. (The problem, for example, on p. 308 demands more knowledge of damages than can be obtained from Chapter 16. Would not a reference here to a case like *Tredegar Iron Co.* v. *Hawthorn, Ltd.*

(1902) 18 T.L.R. 716 assist?) This arrangement of material conjoins topics which are not usually found together, and unavoidably displays views of the authors concerning the law of contract. Stress is rightly placed upon the need for objective certainty by dealing first with Promise and Agreement. (Should not the note on "Promise" come earlier than p. 16?) Under "Offer and Acceptance" we find with the traditional material cases such as those illustrating "unilateral mistake"; but in "Written Contracts" it ought surely to be made more clear that only *signed* documents are being discussed. There follow sections on "Consideration" and "Privity of Contract," treated together in Part II; the former is preceded by a useful note on historical development, contributed by the authors. But in the latter some further comments ought surely to be offered concerning, at least, section 56 of the Law of Property Act, 1925 (perhaps a reference to *Stromdale and Ball, Ltd.* v. *Burden* [1952] Ch. 223; or to Dr. Wade's helpful note in [1954] C.L.J. 66).

In this section, also, the authors' courage seems to fail for the first time, for they include no ingenious problems; and in later chapters the number of such questions suffers a sharp decline. There occur, too, divisions between topics which might be more closely related. To take one example, the distinction between offer and "conditional gift," involving also the question of consideration in unilateral contracts, needs, at least, more cross references between the material on pages 40–42 (where the distinction between unilateral and bilateral contracts might be expressly drawn); page 135; page 185 (Byles J. in *Shadwell's* case); and page 203 (*Combe* v. *Combe* [1951] 2 K.B. 215, which surely ought to be mentioned earlier).

The succeeding parts of the book deal with: III "Capacity" (exclusively Infants); IV "Nature and Extent of Contractual Obligations"; V "Remedies" (Rescission and Damages), and VI, a note in textbook fashion on the Statute of Frauds which is useful but unlikely to be consulted by the student who has a full textbook at hand. There can be no doubt that Part IV is the least satisfactory part of the work. The authors have adopted a scheme which determines their own thinking but which may not always be wholly in accordance with modern English judicial thinking, and may confuse the student in consequence. At first it seems that Chapter 8 is concerned with *contingent* rather than promissory conditions—a distinction which is never clearly drawn and which might have been pointed easily by a quotation from, say, Denning L.J. in *Trans Trust* v. *Danubian Trading* [1952] 2 Q.B. 297, 304. But from *Pym* v. *Campbell* (1856) 6 El & Bl. 370 we are taken at once to *Cutter* v. *Powell* (1795) 6 T.R. 320. The failure to draw the distinction between promissory and contingent conditions also causes *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410 to make an appearance as a contrast to *Bettini* v. *Gye* (*ibid.* p. 183) in Chapter 9;

whereas surely the answer to the problem posed on page 303 is that the case involved a contingent "condition" subsequent, and might be more easily understood if placed in the Frustration Section (where indeed it would surely illustrate exactly the quotation from "Mind" on p. 399). Is there perhaps undue emphasis upon American sources for definition? In particular, the authors open Chapter 8 with a definition of "condition" from the *Restatement*, and support their position with a long passage from Williston to open Chapter 9. Their insistence in placing before the student the distinction between "condition" and "promise" has the air, in the light of our cases, of semantic obstinacy. The distinction between some "core" or "definition" of the contract and promissory "conditions" does not make any appearance until much later in the book. After all, it may have shocked Williston to discover the "astonishing use of the word 'condition' . . . as meaning a certain kind of promise" (p. 293); but the student is going to meet it so used often enough in English judgments. Again, however, he has to wait until much later in the book before some very apposite cases are discovered (such as *Leaf's* case on p. 445; but *Wallis* v. *Pratt & Haynes* [1910] 2 K.B. 1003 is set out in full in Chap. 9).

Chapters 13 and 14 on Mistake and Frustration are an undoubted success. (One would have welcomed some quotations from Mr. C. J. Slade's article in 70 L.Q.R. 385 on "The Myth of Mistake"; an extended account of *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149, when it is the basis of two problems; and a fuller reference to *Davis Contractors* v. *Fareham U.D.C.* [1956] A.C. 696, which perhaps came too late for inclusion otherwise than in the footnote.) But the three preceding chapters are less satisfactory in arrangement. In particular, most of the material here and much elsewhere is intimately concerned with the problem of writing and parol evidence; but nowhere in the book can the student find a reference to material which will clearly introduce him to the principles of law on that topic. This weakness probably lies behind some minor irritations which trouble pupils and detract slightly from the otherwise excellent material. The Section on "Written Contracts" is not contrasted with the unsigned contractual documents of Chapter 12 (containing mainly the "ticket" cases); the difficulties in the "waiver" cases (p. 208 *et seq.*) can be understood only in the light of the development of the rules relating to writing, which is not explained (especially cases decided when section 4 of the Sale of Goods Act, 1893, was unrepealed); and no spotlight is thrown upon the problem of parol evidence in, *e.g.*, *Krell* v. *Henry* [1903] 2 K.B. 740 (a case much discussed on p. 407). Similarly, the only mention of "collateral contract" is in a one-line question on *Webster* v. *Higgin* [1948] 2 All E.R. 127, which although relevant, surely cannot be appreciated by the student from the material supplied to him. A Section on

" Interpretation of Contract " placed earlier in the book might have drawn a number of these threads together, and introduced the student long before Chapter 10 to the idea, too, that statements or promises might or might not be terms of the contract. In that case, some of the defects in the presentation of " exemption clauses "—surely one of the critical areas of modern contract law —might have been avoided. These clauses are discussed in Chapter 12, where the " ticket " cases lead on at speed to the " third party " problems; but already the question of " fundamental breach " has been raised in Chapter 9 (pp. 312–314), where there is a need for an explanation of " total failure of consideration," and, perhaps, mention of cases where it has been unhappily equated with breach of condition (*e.g.*, *Alexander* v. *Railway Executive* [1951] 2 K.B. 882; and *Hain S.S. Co.* v. *Tate and Lyle, Ltd.* [1936] 2 All E.R. 597). This would allow for a further investigation of the limitations on what the courts can possibly do in the face of the ingenious exception clauses of standard forms (some of which might be quoted in full—*e.g.*, in the very useful note on p. 359), leading to the question whether and when an exemption clause might cause the bargain to be a nullity (*cf. Lanitis* v. *Kyodo Shoji* [1956] 2 Lloyd's Rep. 176). Many of these matters are touched upon in the book and the present criticism could perhaps be answered by a short section of text introductory to Part III. As it is, however, students do not find Part IV an easy section of the book to use.

Most of the minor points which come to mind on reading such a work are bound to reflect differences of taste. Occasionally, however, one may justifiably complain of error, as on page 442 where a " contract to take shares in a company " is mistakenly described as one " *uberrimae fidei* " under the " general law." This is particularly unfortunate because the class of contract has, on the previous page, been illustrated quite properly by reference to contracts of marine insurance. Lord Watson stated clearly in *Aaron's Reefs* v. *Twiss* [1896] A.C. 273, p. 287, that the " duty of disclosure is not the same in the case of a prospectus inviting share subscriptions as in the case of a proposal for marine insurance " (see, too, *McKeown* v. *Boudard-Peveril Gear, Ltd.* (1896) 74 L.T. 310, 712). Less important, the discussion of statutes concerning *Cutter* v. *Powell*, page 285, might be accompanied by reference to the Merchant Shipping Act, 1894. The writer wishes that there were a note to *Henkel* v. *Pape* (1870) L.R. 6 Ex. 7, explaining that it is not concerned with a garbled *acceptance*, in view of the way in which students read the appended questions. Is the problem on page 26 not better placed in the chapter on " mistake," with a reference to the problem on page 355? Would not the problem on page 8 suggest reference to cases such as *Garrard* v. *Frankel* (1862) 30 Beav. 445; and that on page 29 be improved by a reference to the notes in Volume 68 of the *Law Quarterly Review*?

On page 80, surely it should be made clear that Lord Craigie dissented in *Dunmore* v. *Alexander* (1830) 9 Sh. & D. 190, just *because* he found the relevant letter to be an acceptance, whereas the other members of the court thought that it was an offer.

In some degree criticisms such as those offered above are an indication of the success enjoyed by authors, one of whose primary aims was to provoke discussion and raise problems. They have in this work done a service to the teaching of contract which will be marked by the use which has been, and will for many years continue to be, made of their book. The expression of a hope that the next edition will cover the entire law of contract in the same style, with the omission of fewer topics, does not detract from their success.

K. W. Wedderburn.

Commonwealth Perspectives. [Durham, N.C.: Duke University Press. London: Cambridge University Press. 1958. viii and 214 pp. 34s. net.]

North Carolina is an unlikely place in which to find an institute of Commonwealth studies. But the Duke University Commonwealth-Studies Center flourishes vigorously and fruitfully, and has already sponsored a number of valuable monographs on the political and economic problems of the Commonwealth and its individual members. *Commonwealth Perspectives* is a symposium of essays based on contributions to an interdisciplinary seminar held at Duke University in 1957. According to the Preface, the broad purpose of the seminar was "to provide for a group of graduate students in economics, history and political science an introduction to Commonwealth problems and to the possibilities for advanced research therein." How far this purpose was realised for the participants in the seminar must be a matter for surmise. The reader may well experience a feeling of disappointment that some of the contributors failed to make the most of their opportunities to link their specialised studies either with the larger issues of Commonwealth relations or with trends and problems apparent in Commonwealth countries other than those particularly examined.

The symposium gets off to an excellent start. Professor Nicholas Mansergh's two essays on Commonwealth Membership and Commonwealth Foreign Policies, 1945–56, are admirable introductory surveys, written with the elegance and incisiveness that characterise all his work. They are followed by a short essay by Professor Robert R. Wilson, an indefatigable organiser of research projects, on the Commonwealth and the Law of Nations. He touches briefly on aspects of nationality questions, obligatory jurisdiction for the settlement of international disputes and some features of the law of international organisations. The paper is informative, but the illustrative material is too fragmentary for

clearly significant conclusions to emerge. Professor Joseph J. Spengler contributes a sociological study entitled "The Commonwealth: Demographic Dimensions; Implications." At least one reader has found this to be a puzzling piece of work. The writer begins with the assumption that countries will not "continue to remain active members of an effective Commonwealth" unless they include substantial *élite* groups of British or Western European origin. His conclusion, which follows inexorably thirty-five pages later, is that having regard to population trends in the United Kingdom and the recent patterns of immigration and emigration within the Commonwealth, "the capacity of that organisation to hold fast in the face of external or centrifugal forces making for its partial dissolution" is likely to diminish. The intervening pages are filled with massively documented demographic and economic data. One is moved to ask what are "active" members, what is an "effective" Commonwealth, why do countries with non-Caucasian *élites* show no disposition to secede from the Commonwealth, and whether this particular exercise was really necessary. Some of the answers are convincingly suggested in Professor J. D. B. Miller's recent book, *The Commonwealth in the World.*

The remaining papers are a factual account of the Emergence of Ghana, by Professor James L. Godfrey; a case study on the Development of Health and Welfare Programmes in Australia, by Professor B. U. Ratchford; and a very helpful essay on the Evolution of the Sterling Area and its Prospects, by Professor Brinley Thomas.

It is useful to have this variegated assortment of essays available within two covers on a bookshelf; it would have been more useful if they had exhibited a greater degree of unity of purpose and direction. One is presented with a good deal of information but a somewhat meagre offering of food for thought. *Commonwealth Perspectives* cannot be placed high in the ranking-list of Duke University's Commonwealth publications, but lawyers and others who take a serious interest in Commonwealth affairs may look for better things to come.

S. A. de Smith.

The Moral Decision. Right and Wrong in the Light of American Law. By Edmond Cahn. [London: Stevens & Sons, Ltd. 1959. x and 342 pp. 25s. net.]

The lawyer who looks for a book of ethics which will treat of the practical problems met with in the law is generally disappointed. There are plenty of discussions of abstract problems in formulising and synthesising moral relations, semantic inquiries into the nature of the ethical "ought," anthropological investigations of other peoples, and historical studies of the development of moral ideas. Rare, indeed, are the books analysing ethical issues in concrete

situations. This book fills a need, and not surprisingly, it comes from the pen of a lawyer. Professor Cahn's plan is to take illustrative cases from the different fields of law and to discuss them not in their technical legal setting but as problems of the moral order. His choice of material ranges into almost every department of law. Does a landowner owe a moral duty towards child trespassers? What are the moral grounds on which marriages may be annulled or dissolved? Can it be said to be immoral to cheat on taxes, or to defraud an impersonal corporation? What is the range of the citizen's affirmative duty towards strangers? Should the law defer to the wishes of an artist in respect of his artist's property, over and above giving him the protection of the law of copyright? How is the principle of loyalty to be reconciled with the wider interests of society?

These and many other matters are discussed with sympathetic insight and a complete absence of doctrinaire authoritarianism. Professor Cahn tilts at the common assumption that the law furnishes no more than "minimum moral standards." He points out that many legal obligations are set so high that few can achieve them. On the other hand, "humanity being what it is and behaving as it does, an effective ethical régime must reserve some intervals and recesses for conduct which is morally neutral. It must even allow for the types of reprehensible conduct which will cost more in moral terms to repress than to tolerate."

Although the principal cases discussed are American, there are several side glances to English law. One is sometimes forced to the feeling that the English courts would stumble over situations that the Americans, with their constitutional Bill of Rights, have been able to take in their stride. Consider, for instance, the case of the Jehovah's Witness who, in wartime, stood on the sidewalk in an Alabama town to display pacifist literature. The entire town was owned by a company which objected to her activities, and she was prosecuted under a state law which made it a crime to enter or remain on the premises of another after being warned not to do so. The lady's conviction was set aside by the Supreme Court, on the ground that the citizens of the town, who as members of a democratic society had to make decisions affecting the welfare of the community at large, had a constitutional right to receive uncensored information; and this right prevailed over the company's technical ownership of the sidewalk. As Professor Cahn points out (p. 176), "it was a bold departure to base the decision on the rights of persons who were not parties to the case and voiced no claim of violated rights." Would an English court have been equally able to rest on the profound social truths of the situation, or would it have been hung up on the traditional doctrine of "passing and repassing"?

Professor Cahn treats the bleak sententiousness of the House of Lords in *Benham* v. *Gambling* with more seriousness than it

deserves. The pessimistic philosophy expressed by their lordships is far from representing the attitude of the well-balanced Englishman, or the common law itself (why, if life holds so little prospect of happiness, is murder very nearly the most infamous of crimes?); and the only thing to be said in its favour is that the House of Lords thought this kind of talk to be necessary in order to get rid of an item of damages which had proved embarrassing in the practical administration of the law.

The publishers are to be congratulated upon making this book available for the English market. It deserves a wide readership.

GLANVILLE WILLIAMS.

The Vinerian Chair and Legal Education. By HAROLD GREVILLE HANBURY, Eleventh Vinerian Professor. [Oxford: Basil Blackwell. 1958. xvii, 248 and (index) 8 pp. 35s. net.]

THIS is a warm and generous account of the former occupants of the Vinerian Chair. It has clearly involved the author in a good deal of research and in a systematic and careful study of the works of his predecessors—not always an attractive task. The author's style never flags, however, and it is a pleasure to read a book so attractively produced and illustrated.

The Chair will always be associated with its first and greatest occupant, Sir William Blackstone. From the account of Blackstone's services to the University we learn a good deal about the man himself, certainly enough to make it clear that he was not the indiscriminate apologist of all things established, but the author is perhaps a little too anxious to portray Blackstone as a restless reformer. The analysis of the *Commentaries* is based largely on Professor Hanbury's Inaugural Lecture; it is a careful and fair appraisal of one of the very greatest works in our legal literature. Blackstone's minor works are much less well known and justifiably therefore the chapter on them is relatively more detailed.

Of Blackstone's five successors before 1882 Wooddeson is the only one who really deserves much space, for most that we know of Chambers concerns his life in India. The account of Wooddeson's work, particularly the *Systematical View*, is more descriptive than critical and thus is less valuable than the treatment of the great *Commentaries*; but it does draw attention to the valuable picture of Equity at the end of the eighteenth century which Wooddeson gives us. The other three Vinerian Professors, James Blackstone, Williams and Kenyon, did very little for legal education. But the author, generous as ever, reminds us of the frustration which the lack of classes must have caused them, and he does much to awaken our sympathy for Kenyon, who towards the end of his tenure of the Chair had to stand comparison with men like Maine and Bryce. Equally striking is the comparison between

Kenyon and his successor, Dicey, whose election in 1882 can well be styled "A Second Foundation" of the Professorship. It is largely to Dicey and Holdsworth that the Vinerian Chair owes its present eminence.

The treatment of Dicey falls into two parts. The first deals with his work on Conflict of Laws and contains a valuable summary of the subsequent development of two topics, the proper law of a contract and the jurisdiction of an English court to annul a marriage. But somehow we lose sight of Dicey. Not so, however, when the author turns to his contribution to Constitutional Law: Dicey's personality and the impact of his ideas are always before the reader.

If Dicey comes to life, Geldart does not. His works are carefully considered, but we can feel the writer's "sense of disappointment" (p. 185) that while the quality of Geldart's work was high, its quantity was small. In fairness one must remember that it was the First World War that terminated Geldart's output and drew him away to Government service. He survived the war by only four years and died at the early age of fifty-two.

The truth is that Professor Hanbury is eager to pass on to Holdsworth, who secures unbounded admiration. Almost the only qualifications the author will admit are that he "cannot have been accounted, in the ordinary run, an attractive lecturer" (p. 195) and that he was "more at home with modern than with medieval history" (p. 213). We can feel the warmth of a pupil's friendship. One suspects that it is this friendship that prompts the reflection that the Vinerian Chair "is the inmost heart of Oxford legal education, for which the claim might without arrogance be made that it is itself the inner heart of legal education in England" (p. 239).

M. J. Prichard.

Legal Personality and Political Pluralism. Edited by Leicester C. Webb. [Melbourne University Press; agents: Cambridge University Press. 1958. xvi and 197 and (index) 2 pp. 30s. net.]

Gierke's advocacy of the Realist theory of corporate personality and Maitland's exposition of it had a powerful impact on Figgis and through Figgis on English political thought; there is therefore much in this book for both lawyers and political scientists. It is a collection of eight essays, which were first read at a seminar organised by the Departments of Law and Political Science at the Australian National University, and is an assessment of trends in the doctrine of legal personality during the last half century and of the relationship between these trends and developments in the structure of the political community.

In the opening essay Professor Derham gives us a survey of

" Theories of Legal Personality," in the course of which he adopts with enthusiasm Professor Hart's argument with respect to corporations (70 L.Q.R. 37), save that he dislikes one of Hart's analogies. This is followed by a good critical account by Dr. Stoljar of Maitland's Corporate Theories. Professor Webb, in " Corporate Personality and Political Pluralism," gives a very interesting account of the influence of Gierke and Maitland on Figgis and the latter's influence on Laski's political pluralism. Figgis, disturbed by *Free Church of Scotland* v. *Overtoun* [1904] A.C. 515, was concerned in his " Churches and the Modern State " (1913) to defend the Church against the idea of the Omnicompetent State. Figgis did not claim for religious bodies any special privileges over other social groups but, relying on Gierke's Realist theory, he argued that social groups have a real personality distinct from their component individuals, and that the state does not create the social groups of which it is composed. Laski followed Figgis by using the real personality formula to secure group autonomy, but, as Professor Webb shows, the weakness of Laski's political pluralism was that, having reduced the state to the position of a group competing with other groups for the allegiance of individuals, it could not construct a plausible theory of the non-sovereign state. Modern American pluralism therefore places less reliance on the prescriptive approach of Figgis and Laski, and places the principal emphasis on a close examination of the structure and processes of group forms as they in fact occur.

The remaining essays are concerned with this more recent type of " analytical " pluralism. Lawyers will be particularly interested in Dr. Stoljar's analysis of the extent to which the courts concede to voluntary associations the right to manage their own affairs, in Mr. R. M. Martin's account of the legal position of trade unions and Australian industrial unions, and in Professor Sawyer's survey of the attribution of legal personality to governmental institutions. Mr. D. Pike also contributes an essay on the relationship between Church and state primarily in Australia. In the final essay Professor Webb summarises recent developments in political pluralism at a time when there is a growing realisation that the group may sometimes be more dangerous to individual freedom than the state.

The legal accuracy of the essays, even those of the non-lawyers, is of a high order, though when Professor Webb says (pp. vi and 52) that the first substantial liberalisation of the terms on which groups could acquire legal personality was the Companies Act, 1862, he underestimates the importance of preceding company legislation. A combined effort by scholars of different disciplines can often be most fruitful, but it tends to be of most value when there is only one representative of each, as witness Keir & Lawson's *Cases* and Berle & Means' *The Modern Corporation and Private Property*. The present volume suffers somewhat from being a

"group" enterprise. Thus, as Professor Webb admits, there are some omissions and disproportions of treatment. Again, not all contributors seem to have revised their essays in the light of later discussion in the seminar. It would have been particularly interesting to have had Professor Derham's views on Professor Sawyer's later comments on Hart.

J. A. Hornby.

Some Problems of the Constitution. By Geoffrey Marshall, m.a., ph.d., Fellow of The Queen's College, Oxford, and Graeme C. Moodie, m.a., Lecturer in Political Science in the University of Glasgow. [London: Hutchinson & Co. (Publishers), Ltd. 1959. 191 and (bibliography and index) 9 pp. 21s. net.]

Students of the Constitution will welcome this readable and up-to-date contribution to the literature of the subject. It should serve as a useful supplement to the more massive standard works.

It is axiomatic that only a part of our system of government is embodied in law. A purely legal enquiry into the office of Prime Minister, for example, would bring to light nothing beyond a salary, a pension, a country residence and a transient interest in physical training and recreation. Yet the non-legal aspects of the Constitution are not so readily accessible. Messrs. Marshall and Moodie concentrate on some of these and examine the problems they present succinctly and clearly.

Three central chapters are devoted to the convention of Ministerial Responsibility, a topic which deserves, though it rarely receives, the pre-eminence traditionally accorded to the Rule of Law and the Supremacy of Parliament. Under the heading "Ministerial Responsibility and the Crown," Mr. Marshall (whose authorship of this section is never in doubt) considers the extent of the Sovereign's personal discretion in relation to the dissolution of Parliament and the choice of Prime Minister and convincingly demonstrates that both matters are potential sources of danger to the position of the Crown, so long as there are no generally recognised criteria. The electoral system, the existence of only two significant parliamentary parties and the adoption by each of these of acknowledged procedures for the identification of their leader are factors which have preserved the Sovereign from embarrassment in recent years, but none of them should be regarded as part of the immutable *data* of the Constitution. Mr. Marshall is prepared to distinguish the Canadian and South African precedents on the ground that the position of a Governor-General may make possible exercises of royal power that would not be open to the Queen herself. For this reason a *fortiori*, no doubt, he makes no reference to the numerous precedents from the Australian States. A chapter

on "Ministerial Responsibility and Parliament" illuminates the elusive character of both collective and personal responsibility under the pressure of the Whips and the congested parliamentary time-table. No doubt a significant difference remains between Question Time in the House and, for example, the press conference held by the President of the United States, but the precise nature of parliamentary authority can probably best be understood by those who are exposed to it from day to day. It is however important that the outsider should appreciate how ill-defined and ultimately ineffective its sanctions can be. There might then be fewer judicial references to parliamentary control of ministers' powers as a justification for refusing intervention by the courts. The Hammersmith constituency boundaries case (*The Times*, December 15, 1954) and its sequel in the House of Commons, which is described in a chapter on "Ministerial Responsibility and the Courts," is a telling illustration of such misplaced optimism. Conversely, ignorance of the nature of judicial control emerges in some parliamentary reactions to Roxburgh J.'s short-lived injunction in *Harper* v. *Home Secretary* [1955] Ch. 238. Mr. Marshall lucidly exposes the continuing confusion in the minds of some members between resolutions of both Houses (here as part of a process of delegated legislation) and an Act of Parliament.

An interesting development has been the impact on the privileges of Parliament of modern media for the expression of public and sectional opinion. Weapons originally designed for defence against royal authority have had to be turned against pressure and criticism from popular sources. A chapter on this subject shows the Commons veering between the severity of the "Sunday Times" cases and the relative moderation of their treatment of the George Strauss affair, which is conveniently related in all its stages. The decision to submit even a part of that matter to judicial consideration may be welcomed, although Mr. Ede in what can safely be claimed as the hyperbole of the decade saw in this step "the end of parliamentary democracy as we know it." Whether Mr. Strauss' letter was a "proceeding in Parliament" remains of course unresolved so far as the courts are concerned, but the ramshackle collection of authorities on which the Committee of Privileges relied is justly treated with reserve. A sinister feature of the episode was the apparent willingness of the House to penalise the mere issue of a writ and thereby to seek to block the citizen's access to the Courts for the ascertainment of his rights. While it is well to point out (as the authors do not) that committal cannot in law prevent an action from proceeding to judgment, as Stockdale demonstrated, the use of such a weapon against a party acting in good faith or his solicitors should now be as unthinkable as its use against a judge. It is presumably unrealistic to hope that the current reform of the procedure in criminal contempt of court will ultimately extend to contempt of Parliament, but a solution which would remove the

possibility of collision between the House and the Courts is clearly desirable in place of the uneasy *modus vivendi* which now prevails. The United States Congress does not appear to have suffered by relying on the protection of the courts of law.

Among ten "Constitutional Footnotes" perhaps the most valuable examines the position of the Law Officers in relation to Ministerial Responsibility, an important and perplexing subject which receives little attention in standard works. It is as well that the independent status of the Attorney-General should be appreciated, since his responsibilities in the field of criminal prosecutions have from time to time placed him near a political storm-centre. A striking example of his position is found in his rôle before a Tribunal of Inquiry, such as the Parker Tribunal, where it may be his duty to adduce or elicit evidence embarrassing to his ministerial colleagues. His salary, on a parity with the Prime Minister's may thus be regarded as more than merely a recognition of the financial expectations of the profession to which he belongs. It should be pointed out, incidentally, that it is somewhat misleading, to state, as the authors do, that the discretion in relation to the institution of proceedings on indictment rests with the Attorney. His leave is rarely required and his subsequent intervention rare.

In other chapters the debate on ministers powers is brought down to the Tribunals and Inquiries Act, 1958, and the problem of defining the conventions of the Constitution is once again shown to be intractable.

HENRY de WAAL.

Books also received include the following:

AHMAD, MUSHTAQ. *Government and Politics in Pakistan.* [Karachi. Pakistan Publishing House. 1959. 20s.]

AL-JASSIM, HAMMOUDI. *Des Modifications à apporter aux Dispositions du Code Pénal Irakien sur la Fixation de la Peine.* [Librairie E. Droz, Geneva; Librairie Minard, Paris. 1959.]

Annual Survey of South African Law. [Juta & Co., Ltd. Johannesburg. 1959. 40s.]

BALL, M. MARGARET. *Nato and the European Union Movement.* [Stevens & Sons, Ltd. 1959. £2 2s.]

BARRY, HON. MR. JUSTICE JOHN VINCENT. *Alexander Maconochie of Norfolk Island.* [O. U. P. Melbourne. 1958. £2 10s.]

BRUSIIN, OTTO. *Zum Ehescheidungsproblem.* [Akademische Buchhandlung, Helsinki. 1959.]

Charlesworth on Negligence. Third Cumulative Supplement to the 3rd edition. [Sweet & Maxwell, Ltd. 1959. 7s. 6d.]

Chitty on Contracts. Fifth Cumulative Supplement to the 21st edition, Vols. 1 and 2. [Sweet & Maxwell, Ltd. 1959. 7s. 6d.]

Clarke Hall and Morrison. *Law relating to Children and Young Persons.* Second Supplement to the 5th edition. [Butterworth & Co., Ltd. 1959. 20s.]

Clerk and Lindsell on Torts. Fifth Cumulative Supplement to the 11th edition. [Sweet & Maxwell, Ltd. 1959. 7s. 6d.]

Coker, G. B. A. *Family Property Among the Yorubas.* [Sweet & Maxwell, Ltd. 1958. £2 5s.]

Drost, Pieter N. *The Crime of State. I, Humanicide. II, Genocide.* [A. W. Sythoff, Leyden. 1959. Fl. 28.90 and Fl. 16.95.]

Elliott, Shelden D. *Improving our Courts.* [Oceana Publications Inc. New York. 1959. $3.95.]

Emmett on Title. Second Cumulative Supplement to the 14th edition. [Solicitors' Law Stationery Society, Ltd. 1959. 25s.]

Garland, Paul Griffith. *American-Brazilian Private International Law.* [Oceana Publications Inc. New York. 1959. $5.00.]

Geldart, W. M. *Elements of English Law.* Sixth edition. [O. U. P. 1959. 7s. 6d.]

Green's Death Duies. Second Cumulative Supplement to the 4th edition. [Butterworth & Co., Ltd. 1959. 8s. 6d.]

International Commission of Jurists. The Question of Tibet and the Rule of Law. [Geneva. 1959.]

McWhinney, Edward. *Judicial Review in the English-Speaking World.* [University of Toronto Press. 1956. $8.50.]

Ogilvie, Sir Charles. *The King's Government and the Common Law.* [Basil Blackwell. 1958. 21s.]

Parisi, Guido Annibale. *Piccola Enciclopedia Giuridica.* [Giuffrè. Milan. 1959. Lire, 1500.]

Pickles, William. *The French Constitution.* [Stevens & Sons, Ltd. 1960. 6s. 6d.]

Seppälä, Marjatta and Esa. *Suomen Lainopillinen Kirjallisuus II,* 1949–1958. [Suomalainen Lakimiesyhdistys, Helsinki. 1959.]

Vinogradoff, Sir Paul. *Common Sense in Law.* Third edition. [O. U. P. 1959. 7s. 6d.]

Vose, Clement E. *Caucasians Only.* The Supreme Court, the NAACP, and the Restrictive Covenant Cases. [University of California Press. 1959. 45s.]

THE UNIVERSITY LAW SOCIETY

1959–60

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In the Michaelmas Term three meetings were held: Sir Edwin Herbert, K.B.E., Past President, The Law Society, spoke on "The Work of Solicitors and Barristers"; Mr. F. H. Lawton, Q.C., Recorder of Cambridge, on "Life in the Law," and Mr. Justice Salmon on "Crimes of Violence."

The first meeting of the Lent Term was the keenly awaited visit of the Rt. Hon. Lord Goddard, G.C.B., who gave an informal survey of his own "Life in the Law" to a most appreciative audience.

The Biennial lecture in Criminology, in conjunction with the Institute of Criminology, was given by Lady Wootton of Abinger, whose treatment of the subject of "Diminished Responsibility" provoked lively discussion within and outside Cambridge. The Society welcomed Mr. Justice Cross to judge our first moot since his elevation to the Bench, against the Oxford Law Society; the problem covered Masters' Common Law Duties to Servants, particularly regarding liability for Independent Contractors. Messrs. R. Sich and K. Davies, of Merton College and Christchurch, Oxford, appeared for the Respondent, and Messrs. P. Thompson and A. Weir of Christ's College and Trinity College, Cambridge, for the Appellants.

Mr. C. W. Bates, Legal Attaché at the American Embassy, read a paper on "Police Systems in the U.S.A.," which included interesting insights into the Federal Bureau of Investigation. We look forward to a further meeting, when Dr. D. West, a psychiatrist of the Maudsley Hospital, London, will talk on "What is a Psychopath."

The Society's Annual Dinner is to be held early in the Easter Term.